SUPREME COURT OF THE UNITED STATES.

No. 296.

ABBY R. LORING ET AL., INFANTS, AND HEIRS OF JOSIAH Q. LORING, DECEASED, BY THEIR NEXT FRIEND, CHRISTIAN W. R. LORING, APPELLANTS,

vs.

LEVI H. MARSH AND PETER RENTON, ADMINISTRATOR, &c.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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1 UNITED STATES OF AMERICA, *Massachusetts district, ss:*

At a circuit court of the United States for the first circuit begun and holden at Boston within and for the district of Massachusetts on Monday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and sixty-five, before the honorable Nathan Clifford, associate justice, and the honorable John Lowell, district judge, in equity—Abby R. Loring *et al.*, complainants, *versus* Levi H. Marsh *et al.*, defendants.

2 The bill of complaint in this cause was filed in the clerk's office on the eighteenth day of January, A. D. 1864, and was entered at the October term of this court, A. D. 1863, and is in the words and figures following, viz:

3 Circuit court of the United States, Massachusetts district, in equity.

To the judges of the circuit court of the United States for the district of Massachusetts:

Abby R. Loring, Marion W. Loring, and Elijah James Loring, infants, under the age of twenty-one years, that is to say, the said Abby R. Loring, of the age of thirteen years, the said Marion W. Loring, of the age of ten years, and the said Elijah James Loring, of the age of eight years, all children of Josiah Q. Loring, deceased, by Christian W. R. Loring, their mother and next friend, all of the city, county and State of New York, and citizens of said State, bring this their bill of complaint against Levi H. Marsh, of Boston, in the county of Suffolk and State of Massachusetts, and a citizen of said State, and Peter Renton, of said Boston, in said State of Massachusetts, and a citizen of said State, administrator of the estate of Abby M. Loring, late of said Boston, deceased.

And thereupon your complainants complain and say that Abigail Loring, widow of Elijah Loring, late of said Boston, deceased at said Boston on the eighth day of November, A. D. 1862, seized and possessed of a large amount of real and personal estate and property, and leaving a last will and testament, and codicil thereto, a copy of which is hereto annexed, marked A, and which your complainants pray may be taken as part of their bill, and which was duly proved, approved, and allowed by the court of probate for the said county of Suffolk, on the eighth day of December, A. D. 1862.

4 And your complainants further say, that in and by said will the said Abigail, after sundry legacies to divers individuals, gave, devised, and bequeathed all the rest, residue and remainder of her estate and property, real and personal, unto Levi H. Marsh and Samuel E. Guild, both of said Boston, to have and to hold the same to them and the survivor of them, and their and his heirs and assigns forever, to their own use, but in trust, to, under, and for the following uses, purposes, trusts, and limitations, namely: to hold, manage, invest, and re-invest the same according to their best discretion, and to pay over one-third of the net income therefrom to my daughter, Abby M. Loring, during her life; to pay over another third of said income to my daugh-

ter, Cornelia W. Thompson, during her life ; and to pay over another third of said income to my son, Josiah Q. Loring, during his life ; taking from each of my said children his or her sole and separate receipt at or before the making of each payment, so that the said income shall go to them personally, and shall not be liable for their debts, or to the control of any other person ; and upon the decease of my said children, severally, the shares of said income which they would continue to take if living shall be retained and invested by the trustees until the decease of my last surviving child, and shall then, with the principal or trust fund, be disposed of for the benefit of the poor, in the manner hereinafter provided.

It is my will that when, upon the decease of all my children, the trust fund is to be disposed of as aforesaid, the said Marsh and Guild, or their successors, as trustees, shall select and appoint three or more gentlemen, who shall be informed of the facts by the trustees, and shall determine how, by the payments to permanently-established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect, and my gift may be made most productive of benefit to the poor, and that thereupon the said trust fund (including the said shares of income retained) shall be disposed of and paid over, in accordance with the determination of the said gentlemen, certified by them in writing, to the trustees.

And your complainants further say, that the said Cornelia W. Thompson, in said will mentioned, died on the tenth day of June, A. D. 1859, without issue ; that the said Josiah Q. Loring, in said will mentioned, died on the sixth day of April, A. D. 1862, leaving issue, your complainants, his sole heirs at law, and that the said Abby M. Loring, in said will mentioned, died on the twenty-second day of June, A. D. 1863, unmarried and without issue, and the said Peter Renton was duly appointed administrator of her estate, and that Samuel E. Guild, one of the trustees named in said will, died on the sixteenth day of July, A. D. 1862.

And your complainants further say, that Levi H. Marsh, the defendant, the surviving trustee named in said will, was duly appointed trustee under said will by the court of probate for the county of Suffolk, on the twenty-fourth day of August, A. D. 1863, and now holds as such trustee a large amount of personal estate and property, consisting of cash, stocks, bonds, notes, and mortgages, of the estate of said Abigail Loring, deceased.

And your complainants further say, that they are advised and believe that the provisions of said will, wherein and whereby, upon the decease of all the children of the said Abigail Loring, the said Marsh and Guild, or their successors, as trustees, should select and appoint three or more gentlemen, who shall be informed of the facts by the trustees, and shall determine how, by the payments to permanently-established and incorporated charitable institutions, her wish to benefit the poor would be best carried into effect, and her gift made most productive of benefit to the poor ; and that thereupon the said trust fund, including the shares of income retained, shall be disposed of and paid over, in accordance with the determination of the said gen-

tlemen, certified by them in writing, to the trustees, are illegal, void, and of no effect; and that if under any circumstances the same might have been valid and capable of execution, which is denied, yet upon the facts above stated the said attempted trusts cannot be executed, and are invalid to deprive your complainants of their aforesaid rights as heirs at law.

And your complainants further say, that all the valid and legal trusts created and declared by said will have ceased and determined, and that your complainants, and the said Abby M. Loring, deceased, whose administrator the said Renton now is, are the sole heirs at law of the said Abigail Loring; and that the property and estate now in the hands of said Levi H. Marsh, the defendant, as trustee under said will, rightfully belongs to your complainants, and the said Renton, as administrator of the said Abby M. Loring, deceased, as the 6 sole heirs at law of said Abigail Loring, and that it is the duty of the said Marsh to convey, transfer, and deliver the same to your complainants, and to the said Renton, administrator, as aforesaid.

And your complainants further say, that since the decease of the said Josiah Q. Loring and the said Abby M. Loring, the children of the said Abigail Loring, your complainants have applied to the said Marsh, the defendant, and requested him to transfer, convey, and pay over to them their shares of the said property, and the income thereof, so held by him as trustee under said will, which he refused to do, and still wholly refuses and neglects to do, and refuses to admit the title of your complainants, and insists that he will act under the aforesaid trust, in some manner to your complainants unknown, and in violation of their just rights in the premises.

To the end, therefore, that the said defendant Marsh may, if he can, show why your complainants should not have the relief hereby prayed, and may upon his corporal oath and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the several interrogatories hereinafter numbered and set forth, that is to say:

1. Whether the said Abigail Loring did not die at said Boston on the eighth day of November, 1862?

2. Whether the said Abigail Loring did not leave a will, a copy of which is hereto annexed, marked A, and whether the same was not duly proved and allowed by the court of probate for the county of Suffolk, on the eighth day of December, 1862?

3. Whether the said Samuel E. Guild, mentioned in said will, did not die before said will was proved and allowed, to wit, on the sixteenth day of July, 1862?

4. Whether the defendant has not been appointed trustee under said will, and has not in his hands and possession a large amount of property as such trustee, and what the same consists of?

5. Whether all the children of the said Abigail Loring have not died?

6. Whether the complainants, and the said Abby M. Loring, deceased, are not the sole heirs at law of the said Abigail Loring?

And that the said Marsh, the defendant, may be decreed to account with your complainants, and pay over to them their shares of
7 the property and money so held by him in trust, as trustee under said will, and that your complainants may have such other and further relief in the premises as the nature of their case shall require, and to your honors shall seem meet.

May it please your honors to grant unto your complainants a writ of subpœna of the United States of America, to be directed to the said Levi H. Marsh, and to the said Peter Renton, administrator aforesaid, commanding them at a certain day and under a certain pain to be therein specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to perform and abide such order and decree therein as to your honors shall seem meet.

CHRISTIAN W. R. LORING, *next friend,*
By HUTCHINS & WHEELER, *her Attorneys.*

HUTCHINS & WHEELER,
Solicitors for Complainants and of Counsel.

Be it remembered, that I, Abigail Loring, widow of the late Elijah Loring, of the city of Boston, being mindful of my age and of my mortality, but being of sound and disposing mind and memory, make this my last will and testament.

I give one thousand dollars to Laurent Clerc, of Hartford, Connecticut.

I give five hundred dollars to the widow of the late Thomas H. Gallaudet, now residing in the city of Washington; and I give to his son, Edward M. Gallaudet, now of Washington, five hundred dollars.

I give one thousand dollars to the Rev. Thomas Gallaudet, of the city of New York, to be disposed of as he thinks best.

I give five hundred dollars to Francis J. Clerc, of St. Louis, Missouri.

I give five hundred dollars to Elijah Loring Turner, son of Job Turner, of Staunton, Virginia.

I give five hundred dollars to Elijah Loring Richards, son of Mrs. Richards, who was Miss Oakes, of Springfield, Massachusetts.

I give to Ruth Oakes, Sarah Oakes, and Maria Oakes, of Cohasset, Massachusetts, five hundred dollars.

8 I give to Matilda Burton, of Cambridge, Massachusetts, widow, two hundred dollars, and to each of her children, one hundred dollars.

I give to Mary S. Atwood, of Nashua, New Hampshire, widow, two hundred dollars, and to each of her children, one hundred dollars.

I give five hundred dollars to George Loring Homer, son of George Homer, of Boston.

I give three hundred dollars to Mrs. Mary Bartlett, of Chelsea, Massachusetts.

I give one hundred dollars to Elijah Loring Fisher, son of Mrs. Elizabeth J. Fisher, of Yarmouthport, Massachusetts.

I give one thousand dollars to Joseph G. Loring, of Malaga, if upon

inquiry made of him by my executor he shall reply that he wants the said sum.

I give one thousand dollars to Levi H. Marsh, of Boston.

I give the income from one thousand dollars to Mrs. Mehitable Bain, widow of the late Captain William Bain, of Dedham, Massachusetts, during her life; and upon her decease, I give one thousand dollars to her grandchildren.

And I hereby authorize my executor at any time to deposit with The Massachusetts Hospital Life Insurance Company one thousand dollars, on such terms as will secure the income therefrom to said Mehitable Bain for her life; and thereupon the above provision for her during life shall cease, and my executor be discharged in the matter until her decease.

I give two hundred dollars to "The Temporary Home for the Destitute."

I give five hundred dollars to "The Fatherless and Widows' Society."

I give two hundred dollars to "The Needlewoman's Friend Society."

All the rest, residue, and remainder of all my estate and property, real and personal, I give, devise, and bequeath unto Levi H. Marsh and Samuel E. Guild, both of said Boston, to have and to hold the same to them and the survivor of them, and their and his heirs and assigns forever, to their own use, but in trust, to, under, and for the following uses, purposes, trusts, and limitations, namely: to hold, manage, invest, and re-invest the same according to their best discretion; and to pay over one-third of the net income therefrom to my daughter, Abby M. Loring, during her life; to pay over another
9 third of said income to my daughter, Cornelia W. Thompson, during her life; and to pay over another third of said income to my son, Josiah Q. Loring, during his life; taking from each of my said children his or her sole and separate receipt, at or before the making of each payment, so that the said income shall go to them personally, and shall not be liable for their debts, or to the control of any other person; and upon the decease of my said children, severally, the shares of said income which they would continue to take if living shall be retained and invested by the trustees until the decease of my last surviving child, and shall then, with the principal, or trust fund, be disposed of for the benefit of the poor, in the manner hereinafter provided.

It is my will that when, upon the decease of all my children, the trust fund is to be disposed of as aforesaid, the said Marsh and Guild, or their successors, as trustees, shall select and appoint three or more gentlemen, who shall be informed of the facts by the trustees, and shall determine how, by the payments to permanently-established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect, and my gift may be made most productive of benefit to the poor; and that thereupon the said trust fund (including the said shares of income retained) shall be disposed of and paid over, in accordance with the determination of the said gentlemen, certified by them in writing, to the trustees.

I hereby authorize the said Marsh and the said Guild, and their

successors, as trustees, to sell and convey any and all real estate which may at any time be in their hands, according to their joint and sole discretion, and so that no purchaser shall be liable to see to the application of the purchase money.

It is my will that the said Marsh and the said Guild shall not be required to give bonds as trustees.

I hereby appoint the said Levi H. Marsh to be the executor of this my last will, and I request that he be exempted from giving a surety or sureties on his official bond as executor.

In witness whereof, I have hereunto set my hand and seal this nineteenth day of October, in the year eighteen hundred and fifty-eight.

ABIGAIL her ⋈ mark. LORING. [L. S.]

10 Signed, sealed, published, and declared by Abigail Loring, as and for her last will and testament, in presence of us, who, at her request, and in her presence, and in the presence of each other, have subscribed our names as witnesses.

THOMAS RUSSELL.
PATRICK WHEELER.
ELIZA A. PRATT.

Boston, October 19th, 1858.

And now, this fourteenth day of July, A. D. 1859, I, Abigail Loring, the testatrix, make this codicil to this my last will:

Whereas by my said will it is provided that the income from the trust fund should be paid in equal third parts to my three children during their lives, and since my execution of my said will, my daughter, Cornelia W. Thompson, has died, now I revoke so much of my said will as provides for the said division of the said income, and its payment in three parts; and I hereby order and direct that the said income shall be paid, under the conditions and provisions in my said will contained, to my daughter, Abby M. Loring, and my son, Josiah Q. Loring, they me surviving, in equal shares during their joint lives, and one-half thereof to the survivor of them, during his or her life, it being my intention that my said two children shall have the whole of the said income in equal shares during their joint lives, if they shall both survive me, and the survivor of them one-half of the said income during his or her life.

In witness of all which, and also in testimony of my ratification and confirmation of everything in my said will contained not hereby expressly altered, I have hereto set my hand and seal.

ABIGAIL her ⋈ mark. LORING. [L. S.]

Signed, sealed, published, and declared by the said Abigail Loring, as and for a codicil to her last will and testament, in presence of us, who at her request, in her presence, and in the presence of each other, have hereto set our names as witnesses—

THOMAS RUSSELL.
PATRICK WHEELER.
ELIZA A. PRATT.

11 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

At a probate court holden at Boston in and for said county of Suffolk, on the eighth day of December, in the year of our Lord one thousand eight hundred and sixty-two—

On the petition of Levi H. Marsh, of said Boston, praying that the instrument therewith presented, purporting to be the last will and testament and one codicil of Abigail Loring, late of said Boston, deceased, may be proved and allowed, and letters testamentary issued to him, the executor therein named, without giving a surety or sureties on his official bond; and the heirs at law, next of kin, and all other persons interested having been duly notified according to the order of court to appear and show cause, if any they have, against the same; and no party objecting thereto, and it appearing that said instruments are the last will and testament of said deceased, and were legally executed, and that said testatrix was, at the times of making the same, of full age and sound mind, and that said petitioner is a competent person to be appointed to said trust, it is, therefore, decreed that said instruments be proved, approved, and allowed as the last will and testament of said deceased, and letters testamentary be issued to said petitioner, he first giving bond, without sureties, for the due performance of said trust.

ISAAC AMES, *Judge of Probate Court.*

A true copy. Attest:

WM. C. BROWN, *Reg.*

On the sixteenth day of February, A. D. 1864, the following answer of Levi H. Marsh was filed in the clerk's office, viz:

The answer of Levi H. Marsh, surviving trustee under the will of Abigail Loring, one of the defendants to the bill of complaint of Abby R. Loring and others.

To the honorable the judges of the circuit court of the United States for the district of Massachusetts:

This defendant, saving all right of exception to the said bill of complaint, for answer thereto saith, that he admits that the
12 said Abigail Loring, deceased, as stated therein, possessed of a large estate, and having made a will concerning the same of the tenor and effect set forth, which was duly proved and allowed, and under which this defendant is now the surviving trustee.

This defendant further admits that two of the children of the said Abigail mentioned in said will deceased before her, and that her other child deceased without issue and intestate, afterwards.

This defendant has no personal knowledge, and does not admit that the said Peter Renton has been appointed administrator on the estate of the said Abby M. Loring, or that the complainants are the heirs and next of kin of the said testatrix.

This defendant denies that the disposition of her estate made by the same Abigail, to take effect upon the decease of her last surviving child, is illegal and void and impossible to be executed, and on the contrary insists that the same is legal and effectual.

This defendant further says, that heretofore, to within the month of December last, in pursuance of the direction in said will contained, he selected and appointed three gentlemen, to wit, Charles G. Loring, Robert C. Winthrop, and Henry B. Rogers, and informed them of the facts, and requested them to determine how, by payments to permanently-established and incorporated charitable institutions of the estate held by him in trust, the wish of the said testatrix to benefit the poor would be best carried into effect, and thereupon the said Loring, Winthrop, and Rogers, having duly considered the matter and the capacities and opportunities of such institutions as were known to them, did thereupon certify in writing to this defendant in what sums and to what institutions the same should be disposed of and paid, a copy of which certificate this defendant annexes and makes the same part of his answer. And this defendant further says that said certificate or award was approved of by him, that the said institutions have respectively accepted the same, and that he was about to pay over to them the said trust fund, when he was prevented by the demand of the complainants and their threat to commence proceedings against him for the recovery of the said trust fund.

And this defendant further says, that before the filing of the complainants' bill, to wit, on the sixteenth day of January last, he filed his bill of complaint in the office of the clerk of the supreme
13 judicial court for the county of Suffolk, in the State of Massachusetts, against the said complainants and the said institutions, praying that they might interplead concerning their respective rights under the said will and certificate, and that process requiring the co mplainants and said institutions to appear and answer was issued and was served upon these complainants before the filing of this bill. And this defendant alleges that the object of the present suit is the same with that of the former or elder suit, to wit, to obtain a judgment or decree as to the validity of the clause and bequest made by the said testatrix for charitable uses, and that the said former or elder suit is still pending, and he prays the same benefit of this defence as if taken by way of plea.

And this defendant further says, that the several charitable institutions mentioned in the said certificate or award, are interested in the result of this suit, and ought to be made parties thereto, but are not, and he prays the same benefit of this defence as if taken by way of plea.

And this defendant further says, that it plainly appears on the face of said bill that this honorable court has not jurisdiction, as between the persons made plaintiffs and defendants thereto, and he prays the same benefit of this defence as if taken by way of demurrer.

And this defendant further says, that it plainly appears on the face of said bill that the complainants' remedy, if any they are entitled to, should be sought in a court of law, and not of equity, and he prays the same benefit of this defence as if taken by way of demurrer.

And this defendant further says, that it appears on the face of the said bill that the said Peter Renton, alleged administrator as aforesaid, made a co-defendant thereto with this defendant, is not a neces-

sary or proper party thereto as a defendant, that no relief against him is prayed for, and that this defendant is in no way interested or concerned with him, and ought not to be implicated with him.

And this defendant further says, that it plainly appears on the face of the said bill that if the said devise and bequest to charities is void and illegal, as the complainants allege, then the said testatrix deceased intestate as to the residue of her estate upon the termination of the life estates thereby created, and that her heirs at law and next of kin entitled thereto would be these complainants, if her lawful heirs and next of kin, and the said Abby M. Loring, and that the said
14 Peter Renton, if duly appointed her administrator, as is alleged, ought to have joined with the complainants in prosecuting this suit, and that no reason is stated in the said bill why he was not or could not be so joined, and he prays the same benefit of this defence as if taken by way of demurrer.

And this defendant further says, that it appears by the complainants' own showing, by their said bill of complaint, that they are not entitled to the discovery or relief prayed for against this defendant, and he prays the same benefit of this defence as if taken by way of demurrer.

And this defendant denies that any matter in the said bill contained material to be answered, not herein answered, confessed, traversed and avoided or denied, is true to his knowledge or belief, all of which he is ready to prove and maintain, as the honorable court shall direct, and humbly prays to be hence dismissed with his costs and charges.

LEVI H. MARSH.

C. W. LORING, *Solicitor.*

MASSACHUSETTS DISTRICT, *February 13th*, 1864.

Sworn to before me.

C. W. LORING, *United States Commissioner.*

To Levi H. Marsh, esq., executor of will of Mrs. Elijah Loring:

DEAR SIR: Having accepted the trust with which you honored us to award the distribution of the munificent legacy bequeathed by the honored lady whose will you are appointed to administer for the benefit of the poor among permanently-established incorporated institutions, and having carefully considered the natures, capacities, and opportunities of all such as, being known by us, appeared proper recipients of her generous bounty, and having submitted the apportionment for your approval, we declare the following to be the distribution which we advise and direct.

15 1. To the Massachusetts General Hospital the sum of thirty thousand dollars, and the balance of the fund, if any shall remain after payments of all the amounts herein awarded, not to exceed, however, the further sum of five thousand dollars, to be appropriated entirely for free beds.

2. To the Boston Provident Association the sum of fifteen thousand dollars, to be invested as a permanent fund to be called the Loring fund, the income to be appropriated to defraying of the expenses of the corporation so long as it shall continue in operation and need that

amount or more; the surplus, if any, to be appropriated for the general purposes of the institution.

3. To the Association for the Relief of Aged Indigent Females the sum of thirteen thousand dollars to be set apart as a separate fund to be denominated the Loring fund; the income to be for the general use of the association.

4. To the Boston Dispensary the sum of five thousand dollars.

5. To the Boston Asylum and Farm School for Indigent Boys the sum of ten thousand dollars.

6. To the Howard Benevolent Society the sum of ten thousand dollars, to be invested as a permanent fund and denominated the Loring fund, upon condition, however, that such portion of the income thereof as may be needed for the purpose shall be appropriated to the semi-annual assistance and relief of the persons whom the testatrix and her daughter, Miss Abby M. Loring, were, or either of them was, accustomed to assist or relieve, and who shall be named in the list thereof signed by the executor and delivered to said society on payment of the fund, or whose names he may subsequently add thereto.

7. To the Warren Street Chapel the sum of eight thousand dollars.

8. To the Sailors' Snug Harbor the sum of eight thousand dollars.

9. To the Temporary Home for the Destitute the sum of ten thousand dollars, to be invested as a permanent fund denominated the Loring fund, the income to be used for the general purposes of the institution.

10. To the Seaman's Aid Society the sum of five thousand dollars, to be appropriated exclusively in relieving the necessities of destitute seamen and their families, and not for the purposes of maintaining homes, or chapels, or religious teachings, &c., or any other general purposes.

16 11. To the Boston Seaman's Friend Society the sum of five thousand dollars, to be appropriated exclusively in relieving the necessities of destitute seamen and their families, and not for the purposes of maintaining homes, or chapels, or religious teachings, or any other general purposes.

12. To the Massachusetts Charitable Eye and Ear Infirmary the sum of four thousand dollars.

13. To the Boston Female Asylum the sum of five thousand dollars, to be set apart as a separate fund to be denominated the Loring fund, the income to be appropriated to the general purposes of the institution.

14. To the Church Home for Orphan and Destitute Children the sum of five thousand dollars.

15. To the Young Men's Benevolent Society the sum of four thousand dollars.

16. To the Boston Children's Friend Society the sum of three thousand dollars.

17. To the Boston Society for the Prevention of Pauperism the sum of three thousand dollars.

18. To the Boston Fatherless and Widows' Society the sum of ten

thousand dollars, as a permanent fund denominated the Loring fund, upon condition, however, that such portion of the income thereof as may be needed for the purpose shall be appropriated to the semi-annual assistance and relief of the persons whom the testatrix and her daughter, Miss Abby M. Loring, were, or either of them was, accustomed to assist or relieve, and who shall be named in the list thereof signed by the said executor and delivered to said society on payment of the fund, or whose names he may subsequently add thereto.

19. To the Needle Woman's Friend Society the sum of five thousand dollars, to be invested as a permanent fund denominated the Loring fund, and the income to be applied to the general purposes of the society.

20. To St. Stephen's Chapel the sum of five thousand dollars, two thousand for the purchase of two free beds at the Massachusetts General Hospital for the use of the chapel, and the remaining three thousand to be used at the discretion of the corporation.

21. To the Home for Aged Men the sum of five thousand
17 dollars.

22. To St. Mary's Chapel the sum of three thousand dollars.

The aggregate of the above-awarded sums is one hundred and seventy-one thousand dollars. If the fund should prove insufficient for payment of all of them, we direct a pro rata apportionment of the deficiency. If it should exceed that aggregate in any amount not beyond five thousand dollars, we appoint such excess to be paid to the Massachusetts General Hospital, for the purchase of free beds. And if the excess should exceed five thousand dollars, the residue is to be subject of future disposal by us.

If there be any questions made, as has been intimated by the heirs, of the validity of the bequest, we advise the payments to be made to trustees for the benefit of the several institutions, to be held until such question shall have been judicially settled.

We are, dear sir, very respectfully, your friends and ob't servants,

CHARLES G. LORING.
ROBERT C. WINTHROP.
HENRY B. ROGERS.

Boston, Dec. 20, 1863.

18 On the 9th day of April, A. D. 1864, the following amendment of bill was filed in the clerk's office, viz:

Circuit court of the United States, Massachusetts district.

ABBY R. LORING and *al.*
vs.
LEVI H. MARSH and *al.*
} In equity.

And, now upon the coming in of the answer of the defendant, Levi H. Marsh, the complainants in the above-entitled cause come and move to amend their bill of complaint by joining, as defendants therein, The Massachusetts General Hospital, the Boston Provident Association, The Association for the Relief of Aged Indigent Females, The Boston Dispensary, The Boston Asylum and Farm School for In-

digent Boys, The Howard Benevolent Society, The Warren Street Chapel, The Sailors' Snug Harbor, The Temporary Home for the Destitute, The Seamen's Aid Society, The Boston Seamen's Friend Society, The Massachusetts Charitable Eye and Ear Infirmary, The Boston Female Asylum, The Church Home for Orphan Destitute Children, The Young Men's Benevolent Society, The Boston Children's Friend Society, The Boston Society for the Prevention of Pauperism, The Boston Fatherless and Widows' Society, The Needlewoman's Friend Society, St. Stephen's Chapel, The Home for Aged Men, and St. Mary's Chapel, all corporations duly incorporated by the laws of the State of Massachusetts, in Boston, in said State; and by inserting on the fifth page, twenty-fourth line, after the words "administrator as aforesaid," the words following: "And your complainants further say, that they are informed and believe that the said defendant, Levi H. Marsh, undertook to select and appoint three gentlemen, to wit, Charles C. Loring, Robert C. Winthrop, and Henry B. Rogers, to determine to what permanently-established incorporated institutions the said trust fund, including the shares of income returned, should be disposed of and paid over; that said Loring, Winthrop, and Rogers have certified in writing to the
19 said Marsh that the said trust fund should be distributed among the corporations hereinbefore-mentioned. But the complainants deny that said Marsh had any authority so to act under the provisions of said will. And the complainants deny that, by virtue of any proceedings such as are hereinbefore set forth, any rights whatever have been obtained in said trust fund by said institutions or either of them." And by inserting on the seventh page, nineteenth line, after the words "administrators as aforesaid," the said The Massachusetts General Hospital, The Boston Provident Association, The Association for the Relief of Aged Indigent Females, The Boston Dispensary, The Boston Asylum and Farm School for Indigent Boys, The Howard Benevolent Society, The Warren Street Chapel, The Sailors' Snug Harbor, The Temporary Home for the Destitute, The Seamen's Aid Society, The Boston Seamen's Friend Society, The Massachusetts Charitable Eye and Ear Infirmary, The Boston Female Asylum, The Church Home for Orphan Destitute Children, The Young Men's Benevolent Society, The Boston Children's Friend Society, The Boston Society for the Prevention of Pauperism, The Boston Fatherless and Widows' Society, The Needlewoman's Friend Society, St. Stephen's Chapel, The Home for Aged Men, and St. Mary's Chapel.

HUTCHINS & WHEELER,
Solicitors for Complainants.

I assent to the filing of this amendment, and accept service for the new defendants, the plaintiffs waiving an answer under oath.

F. C. LORING, *Solicitor.*

On the ninth day of April, A. D. 1864, the following answer was filed in the clerk's office, viz:

Circuit court of the United States.

ABBY M. LORING and *al.*
vs.
L. H. MARSH.

The answer of the Massachusetts General Hospital and other corporations, made defendants, to the amended bill.

These defendants, for answer to the said amended bill of complaint, say that they claim such interest as they are entitled to in the funds of the defendant Marsh, by reason of the will and the proceedings set forth in his answer, and submit their interest to the decisions of this honorable court.

F. C. LORING, *Solicitor.*

20 On the ninth day of April, A. D. 1864, the following replication was filed in the clerk's office, viz:

Circuit court of the United States, Massachusetts district.

MARION W. LORING and *al.*
vs.
LEVI H. MARSH and *al.*

The replication of Marion W. Loring and other complainants to the answers of Levi H. Marsh and others, defendants.

These repliants, saving and reserving unto themselves all manner of advantage of exception to the manifold insufficiencies of the said answers, for replication thereunto say they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law, to be replied unto, confessed and avoided, traversed or denied, is true, all which matters and things, these repliants are and will be ready to aver and prove, as this honorable court shall direct, and humbly pray, as in and by their said bill they have already prayed.

By HUTCHINS & WHEELER, *their Solicitors.*

On the thirteenth day of May, A. D. 1864, the follow amendment of bill was filed in the clerk's office, viz:

Circuit court of the United States.

MASSACHUSETTS DISTRICT, *ss:*

ABBY R. LORING and *al.*
vs.
LEVI H. MARSH and *al.*
In equity.

And now the complainants in the above-entitled cause come and move to amend their bill of complaint by inserting on the sixth page,

on the eighth line, after the words "rights in the premises," the words following:

And your complainants further say, that being the children and sole issue of Josiah Q. Loring, who was a child of the said Abigail Loring, and who deceased before the said Abigail Loring, as hereinbefore set forth, and that the said Abigail, in her said will, omitted to provide for your complainants; that your complainants were not provided for by the said Abigail during her lifetime; and your complainants say, that such omission was not intentional, but that the same was occasioned by accident or mistake, and that if, under any circumstances, the trusts attempted to be created by said will might have been valid or legal, your complainants are entitled by the laws of the State of Massachusetts to take the same share of the estate of the said Abigail Loring, both real and personal, that they would have been entitled to had she died intestate; and your complainants say, that by the provisions of the laws of the State of Massachusetts they would have been, and now are, as such issue of a deceased child, entitled to one-half of the estate, both real and personal, of the said Abigail; nd the said Marsh, as executor and trustee, is justly and equitably accountable to your complainants therefor.

CHRISTIAN W. R. LORING, *next friend*,
By HUTCHINS & WHEELER, *her Attorneys.*

I consent to the filing of this amendment, reserving right to amend answer.

F. C. LORING, *for Defendants.*

21 On the twenty-fourth day of May, A. D. 1864, the following answer to the amendment of bill of complaint was filed in the clerk's office, viz:

Circuit court of the United States, first circuit, Massachusetts district.

ABBY R. LORING and *al.*
vs.
L. H. MARSH, ex'r, and *al.*

And now the defendant, Marsh, for answer to the amendment to the bill of complaint, comes and says:

That if the said complainants are the lawful issue of the said Josiah Q. Loring, which this defendant does not know or admit, he is ignorant as to whether or not the said testatrix made any provision for them in her lifetime, and he denies that if she did not, they would be entitled by the laws of Massachusetts to any part of her estate.

This defendant further says, that at the time of the making of the said will, the said Josiah Q. Loring, father, as is alleged, of the said complainants, was living, and that a provision for him was made by the said will.

This defendant further says, that the omission to provide for his supposed children (the complainants) did not occur by accident or mistake, but the same was designed and intentional, and that when the said will was made, and afterwards up to the time of her decease,

the said testatrix continually and always intended to make no provision for them, and that they should receive no part of her estate.

LEVI H. MARSH.

F. C. LORING, *Solicitor.*

BOSTON, *May* 24, 1864.

UNITED STATES OF AMERICA, *Massachusetts district:*

Subscribed and sworn to this day by said Marsh, before me.

CHARLES P. CURTIS, JR., *U. S. Commissioner.*

22 On the eleventh day of October, A. D. 1864, on motion of complainants, it is ordered that the bill be taken *pro confesso* as to the defendant Peter Renton, for default of answer, and on the same day the following agreements are filed in the clerk's office, viz:

United States circuit court.

LORING *vs.* MARSH.

It is agreed that the defendant, Peter Renton, was appointed guardian of the several infant complainants by the court of probate for the county of Middlesex in this State, on the 22d day of April, 1862, accepted the trust, was duly qualified, and continues to be such guardian.

HUTCHINS & WHEELER, *for Complainants.*
F. C. LORING, *for Defendants.*

Circuit court of the United States, district of Massachusetts.

ABBY R. LORING and *al.* *vs.* LEVI H. MARSH and *al.*

The defendants admit that Peter Renton, one of the defendants, is administrator of the estate of Abby M. Loring, as alleged in the complainants' bill, and that the complainants Abby R. Loring, Marion W. Loring, and Elijah James Loring are some of the heirs at law of Abigail Loring, as alleged in said bill.

F. C. LORING,
For Defendants, except Renton.

23 This complaint, entered at the October term of this court, A. D. 1863, as aforesaid, was thence continued from term to term to the October term, A. D. 1864 when, by consent of parties and without further replication, publication was ordered and the cause set down for hearing. Thereupon the following motions were offered, namely: The defendants, except Peter Renton, respectfully ask that this cause may be continued until a prior suit in equity pending in the supreme judicial court of Massachusetts, to which all the parties to this suit are made parties, respecting the construction and validity of the same will and devise, and presenting the same questions of

law and fact, shall be heard and determined. Second. If this motion is denied, then that a reference to a master may be ordered, after the usual practice, to look into the two suits and to report whether or not they are both upon the same matter and between the same par-
23½ ties, the complainants having neglected to procure such a reference. Third. That if the court shall deny the last preceding motion on the ground that the replication admits the objection of the pending suit to be valid in law, but denies that any such suit is pending, then we ask that the cause may stand over until the special service ordered by the State court on some of the parties defendant may be completed. These motions having been heard and considered by the court, were denied, and the cause was fully heard. The same was thence continued to this present term, when the death of one of the defendants, Peter Renton, is suggested, and an agreement is filed as follows:

United States circuit court, Massachusetts district.

ABBY R. LORING *et al.*, infants, by Christian W. R. Loring, their mother and next friend,
24 *vs.*
LEVI H. MARSH *et al.*

Peter Renton, administrator of Abby M. Loring, one of the defendants in the above-entitled cause, having died, and Robert R. Bishop having been appointed administrator *de bonis non* of the estate of said Abby M. Loring, it is agreed that the said Robert R. Bishop be admitted as a party defendant in said cause as administrator *de bonis non* of the estate of the said Abby M. Loring, and that the said cause stand revived.

F. C. LORING, *for Def't Corporations.*
C. W. LORING, *Sol'r for Def'ts.*
HUTCHINS & WHEELER, *for Comp'ts.*

Which agreement is allowed by the court, and the following decree is entered, namely: This cause came on to be heard at the last term of this court and was argued by counsel. The same was continued under advisement to this present term; and now, after mature deliberation thereon had, it is ordered, adjudged, and decreed that the complainants' said bill of complaint be and same is hereby dis-
24½ missed with costs for the defendants taxed at .

From which decree the complainants in open court claim an appeal as follows:

And now, after final decree, the said Abby R. Loring and others, complainants, being here in court by Hutchins & Wheeler, their authorized attorneys, claim an appeal to the Supreme Court of the United States next to be held at Washington.

Abby R. Loring, Marion M. Loring, and Elijah J. Loring, infants, who sue by Christian W. R. Loring, their mother and next friend, by—

HUTCHINS & WHEELER, *their Attorneys.*

Which appeal is allowed by the court, and said complainants give good and sufficient security to prosecute their said appeal with effect, and to pay all damages and costs in case they shall fail to make good their said appeal, which security is approved by the court.

A true record.

Attest: JOHN G. STETSON, *Clerk pro tem.*

25 At the hearing of said cause the following evidence was used:

Deposition of S. Benton Thompson.

Int. 1. What is your name, age, residence and occupation?

Ans. My name is S. Benton Thompson; age, forty-seven years; residence, Lincoln, Massachusetts; and I am United States provost marshal.

Int. 2. Whether or not did you know Mrs. Abigail Loring, widow of Elijah Loring, late of Boston? If yea, when did your acquaintance with her commence, when did it terminate, and were you or not connected with her, and if so, how?

Ans. I knew Mrs. Loring. My acquaintance with her commenced in 1849. I married her daughter. My acquaintance with her terminated in October or September, 1862, with her death, which occurred, I think, in one of those months.

Int. 3. Whether or not did you ever reside in the same house with Mrs. Loring? If yea, how long, and when did you cease to reside in the same house with her?

Ans. I resided in the house with her from the time of my marriage until she died, with occasional intervals when I resided at my country place in Lincoln. My legal residence from 1860 to 1862 was in Lincoln, but I passed a great deal of my time in Boston, and always at Mrs. Loring's.

Int. 4. Please state the nature and extent of your acquaintance with Mrs. Loring, and the degree of intimacy, if any, that existed between you and her.

Ans. The intimacy which would naturally exist between a son-in-law and mother-in-law, where the son-in-law resided in her family. Our relations were always cordial.

Int. 5. What was the state of Mrs. Loring's health for the four years prior to her death?

Ans. She was confined to her room with the infirmities of old age upon her, suffering very much from an affection of her nervous system, and from rheumatism—confined to her room, but not to her bed; but never so well as to take her meals with the family.

Int. 6. For how long a period before her death was she confined to her room as stated in your last answer?

26 Ans. She was, in fact, in this condition from the time of my marriage until she died. I never saw her below stairs. During most of this time she was able to walk from one room to another on the same floor, and most of her exercise she took in this way.

Int. 7. How often did you see Mrs. Loring, and at what times in the day?

Ans. I was in the habit of seeing her every morning when I was at home, and I was at home most of the time. I always called as I came down in the morning from my sleeping room to ask her how she was, and often saw her in the afternoon.

Int. 8. How much time did you spend with her?

Ans. I would stay, perhaps, five or ten minutes in the morning—seldom exceeding that in the morning—and in the afternoon as it might happen; sometimes twenty minutes and sometimes half an hour—as long as it appeared agreeable to her. Sometimes she was disposed to talk and sometimes not.

Int. 9. What persons constituted Mrs. Loring's household during the four years prior to her death?

Ans. Myself and wife; my wife's sister, Abby M. Loring; and a little girl, daughter of Joseph Loring, whose name was Seraphina Loring. She was a child some eight or nine years old in 1857 or 1858. Those were the regular members of the family. Mr. Joseph Loring, the father of Seraphina, was there very often, dining, and so forth. In addition were the servants. My wife died in June, 1859.

Int. 10. How many children had Mrs. Loring living in October, 1858, and what were their names?

Ans. She had Josiah Q. Loring, Abby M. Loring, my wife, Cornelia W. Thompson. That was all.

Int. 11. Whether or not did any, and if any, which, of said children die before Mrs. Loring's decease, and when?

Ans. Mrs. Thompson, who died in June, 1859, and Josiah Q., who died, I think, in April, 1862. I think it was in April.

Int. 12. Had said Josiah Q. Loring any children? If yea, what were their names, and whether or not are they now living?

Ans. Yes. He had four, three of whom are now living—Abby Rand Loring, Minnie Winifred, Jessie Campbell, and Elisha James. Jessie died, if I remember correctly, in March, 1856.

27 Int. 13. Whether or not did said children visit their grandmother, Mrs. Abigail Loring?

Ans. I believe they did visit her, but I don't remember that I ever saw them together. I don't remember that I ever happened to be in Mrs. Loring's room when the children were there. I should say that they visited her occasionally, not very often.

Int. 14. Whether or not was Mrs. Loring fond of the children of said Josiah?

Ans. It would be very difficult for me to answer that question. At the time Abby Rand was born, she seemed to be very fond of her.

Int. 15. Whether or not did you ever hear Mrs. Loring express any dislike to said children?

Ans. I never did.

Int. 16. Whether or not did you ever hear Mrs. Loring express any intention, or purpose, that said children should have no part of her property?

(Objected to as leading.)

Ans. I never did. She was not in the habit of talking about such matters, even to her own children.

Int. 17. Whether or not did you ever hear Mrs. Loring express any intention as to the disposition of her property, so far as said children were concerned?

Ans. Never one word.

Int. 18. Whether do you know Eliza A. Pratt, who lived in the family of Mrs. Loring?

Ans. I do.

Int. 19. In what capacity did she so live?

Ans. As house servant.

Int. 20. What were her relations to Mrs. Loring? What were her duties?

Ans. The duties assigned her were mainly to sit in the hall outside of Mrs. Loring's room, and to attend to her calls and do whatever Mrs. Loring wished; her time was occupied mostly in that way, though she occasionally did other duties about the house, such as waiting on the table in the absence of the man servant, and answering the door bell. Her relations to Mrs. Loring were simply those of a personal attendant, a servant.

28 Int. 21. Whether or not was said Eliza A. Pratt a confidante or friend of Mrs. Loring?

Ans. I am surprised at such a question being asked. She was simply a servant. I know of no other relations between the two. She could not be anything else in the nature of things.

Int. 22. Where did said Eliza live before she entered the service of Mrs. Loring?

Ans. I couldn't tell you; I don't know.

Cross-examination by F. C. Loring, esq., for respondents:

Cross-int. 1. What relations existed between the said Mrs. Loring and the family of the wife of the said Josiah Q Loring? Were they intimate? Was she fond of them, or otherwise?

Ans. It would be difficult for me to answer that question. I never saw Mrs. Loring with the children, as I have before said. As to the question in reference to the family of Mrs. Josiah Q. Loring, it would be difficult for me to answer.

Direct examination resumed:

Int. 1. Whether or not did you ever hear Mrs. Loring say anything evincing dislike to the family of the wife of her son Josiah Q.?

Ans. I don't recollect that I ever did.

S. BENTON THOMPSON.

Deposition of L. H. Marsh.

Levi H. Marsh, of Boston, merchant, being duly sworn, deposes and says as follows:

I was clerk to the late Elijah Loring from 1820 to his death in 1846. I was appointed one of his executors by his will. For a time after

his death I had charge of his property, until the estate was settled, and afterwards had charge of Mrs. Loring's—his widow's—affairs, up to her decease, and was one of the executors of her will.

39 Int. 1. Before her will was made, did you or not ever hear her express any intention as to the disposition of her property after her death?

Ans. No, sir.

Int. 2. Did she or not say anything to you about it after her will was made? If so, what?

(Objected to.)

Ans. Yes, she did. She sent for me to her room, and when I went in she said to me, "Will you attend to my wishes and carry them out?"—alluding to the will. This was within a month or two after she made the will. That was all she said.

Int. 3. Have you or not any knowledge as to her opinions of, and feelings towards, the family of the wife of her deceased son, Josiah Q.? If so, what were they?

(Objected to.)

Ans. Not from her. I have from others.

Int. 4. State what you know of them from others, and from whom.

(Objected to.)

Ans. I received the impression from conversation with others that she was prejudiced against the family. I received that impression from conversation with her daughter.

LEVI H. MARSH.

30 Supreme judicial court.

SUFFOLK, *ss:*

LEVI H. MARSH
vs.
PETER RENTON and als.

Interrogatories exhibited by the complainant to the defendant, Peter Renton.

First. Are not the Abby M. Loring, Marion W. Loring, and Elijah James Loring children of Josiah Q. Loring, deceased? And did not the said Josiah Q., at the time of his decease, and previously, reside in this State, and was he not a citizen thereof?

Second. Please to state on what day, in what month and year, and at what hour of the day, the said children and their said mother removed to the State of New York, and to what city or town in said State they did remove, and when they arrived there.

Third. Up to the time of such removal, did they not occupy a house in Newton, or elsewhere, in this State? If yea, to whom did it belong, and if hired, by whom?

Fourth. Before, or at the time of such removal, or since, did the furniture of said house, or any part thereof, belong to them? If so, was it removed to New York, in whole or in part?

Fifth. Where were said children on the sixteenth day of January last, at the time when the subpœna in this suit was served upon you?

Sixth. Where had they resided previously to that date—in this State of New York? Please to state how long they had resided in this State, and how long in New York.

Seventh. How long did they remain in New York? How long did their mother? Where do they and she now reside, and how long have they resided there?

Eighth. Was not the object and intent of such removal to New York to give said children an opportunity to bring a suit against this complainant in the United States circuit court for this district?

Ninth. Did you not advise such removal for such purpose? By whose advice was it done?

Tenth. Did not the said children and their mother arrive in Boston on the sixteenth day of January last?

31 Eleventh. Have they since returned to New York? If yea, how long did they stay there? Where are they now? Do they not now occupy the same house they did before the removal to New York?

Twelfth. Were not the said children, or some of them, and their mother, in Boston or elsewhere in this State, on the sixteenth day of January last?

F. C. & C. W. LORING,
Solicitors and Atty's for Plaintiff.

JUNE 18, 1864.

SUFFOLK, *ss:*

I declare that I have reasonable cause to believe that the plaintiff will derive some material benefit from the discovery herein sought, if fairly made, and that the discovery is not sought for the purpose of delay.

F. C. LORING, *Plaintiff's Attorney.*

Sworn to before me.

JOHN LATHROP, *Justice of the Peace.*

Filed June 20, 1864. Attest:
GEORGE W. NICHOLS, *Assistant Clerk.*

Supreme judicial court.

SUFFOLK, *ss:*

LEVI H. MARSH
vs.
PETER RENTON and *al.*

Answer of Peter Renton to complainants' interrogatories.

First. Abby R. Loring, Marion W. Loring, and Elijah James Loring are children of Josiah Q. Loring, deceased. Said Josiah Q., at the time of his decease and previously, resided in this State and was an inhabitant thereof.

Second. The said children and their said mother removed [to] the city, county, and State of New York on the fifth day of Janu-
32 ary, A. D. 1864. They left this State in the morning, and arrived at their place of residence in New York in the evening of the same day, which was the 5th day of January, A. D. 1864.

Third. Up to the time of their removal, they occupied a house in Weston, in this State. The fee of the estate was in said Josiah Q. Loring at the time of his decease.

Fourth. The furniture belonged to Mrs. Loring, in part, and in part to her children. There was some furniture sent to Mrs. Loring's house in New York, but I can't say whether any from the house in Weston or not.

Fifth. In the city of New York, at their place of residence.

Sixth. They had resided in New York from the time of their removal, as stated in my second answer. Previously to such removal, they had always resided in this State.

Seventh. They have remained in New York ever since, as has also their mother. The whole family now reside in New York, and have done so ever since their removal, as stated in my second answer.

Eighth. Mrs. Loring, the mother of said children, had, for several months, intended to remove from this State on account of her health, her lungs having been affected, and she engaged a house in Philadelphia for that purpose, but was obliged to give up the same; and not finding another house in Philadelphia, took a lease of a house in New York. Had she not been disappointed in obtaining the house in Philadelphia she would have removed from this State with her children a considerable time before she actually removed, she having been delayed on account of the difficulty in obtaining a suitable place of residence. Another object of her removal was that her children might become inhabitants of another State, so that they might enforce their rights in the estate of their grandmother in the courts of the United States.

Ninth. I advised her removal for both purposes mentioned in my last answer.

Tenth. They did not.

Eleventh. They have not, to my knowledge, information, supposition, or belief, left New York since their removal to that city, as stated in my second answer. They are now there, and occupy
33 the same house in said city to which they then removed, and do not occupy the same house they did before their removal to New York.

Twelfth. They were not.

PETER RENTON.

JULY 6, 1864.

SUFFOLK, *ss:*

Subscribed and sworn to before me.

A. S. WHEELER, *Justice of the Peace.*

Filed July 6, 1864. Attest:

GEO. W. NICHOLS, *Ass't Clerk.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

I, Geo. W. Nichols, assistant clerk of the supreme judicial court in and for said county of Suffolk, hereby certify that the foregoing is a true copy of interrogatories to the defendant Peter Renton, and of

his answers to the same, in the case of Levi H. Marsh, in equity, against Peter Renton and *als.* now pending in said supreme judicial court, and that the same were read by the complainant at the hearing in said case.

In witness whereof, I have hereto signed my name and affixed the seal of said court, this twenty-first day of October, A. D. 1864.

[L. S.] GEO. W. NICHOLS, *Assistant Clerk.*

34 *Deposition of Matilda R. Burton.*

Int. 1. What is your name and place of residence?

Ans. My name is Matilda R. Burton; residence, East Cambridge, Mass.

(The complainants object to the competeney of this deponent as a witness, on the ground that she is a legatee named in the will of Abigail Loring.)

Int. 2. Have you or not been acquainted with the late Mrs. Abibail Loring, widow of Elijah Loring, of Boston? If yea, for how many years did you know her before her decease, and how intimately?

Ans. I was acquainted with her thirty-four years ago, I think, and my acquaintance continued during that period. I was in the family ten years. I was in her room and took care of her when she was sick. I was there as a seamstress. I sat with her. Since that ten years I have been in the family occasionally, and since I was married I have visited there very often. Whenever I visited there I went to her room, when others did not, at times when she was sick.

Int. 3. Did you or not know her in October, 1858, and from that time to her decease? Were you or not, during that time, a visitor at her house? If yea, how often? Did you or not see her when you called, and if so, how often?

Ans. I did know her in October, 1858, and from that time to her decease. I was a visitor at her house during that period, as often as once a fortnight, I think. If I could get to Boston I would be there as often as twice a week. I always saw her when I called. There was once when I called that she was very sick, and I didn't see her. I don't know as there was any other time when I called that I did not see her.

Int. 4. Whether or not, during the last years of her life, did she ever mention or allude to her son Josiah Q. Loring and his children, in your presence? If so, frequently or otherwise?

Ans. She always spoke of them. The last year or two she didn't speak of them so often as before. There was some trouble in the family; but I always would ask after them, and she would say they were well. But after there was a little trouble in the family
35 she didn't speak of them as readily; we didn't speak of them as often as we did before.

(Answer is objected to by complainants.)

Int. 5. Whether or not did she, at any time or times, express any intention as to whether the children of the said Josiah Q. should or should not have any of her estate after her decease?

(Objected to by complainants.)

Ans. About four weeks before she died I called to see her, and in conversation she said that they had got enough, and that Dr. Renton had all he would ever get. That was all she said about them.

Int. 6. Was she or not in the habit of speaking freely about her will?

Ans. She was not.

Int. 7. Did she or not give any reason for saying that her son's children should have no part of her estate? State all that she said.

(Objected to by complainants.)

Ans. She did not.

MATILDA R. BURTON.

Deposition of Eliza A. Pratt.

Deposition of a witness taken in an action pending in the circuit court of the United States within and for the Massachusetts district, wherein Abby R. Loring *et al.* is plaintiff, and L. H. Marsh *et als.* is defendant, and for said defendant, and taken in pursuance of a commission issued by said court and directed to John M. Langston, esq., notary public, or Barney Prentiss, justice of the peace, at Oberlin, Ohio.

OBERLIN, LORAIN COUNTY, OHIO, *July* 27, 1864.

John M. Langston, one of the persons mentioned in said commission, being necessarily absent, Barney Prentiss aforesaid being present and at his residence in Oberlin aforesaid, neither party or their
36 agent or attorney being present, Eliza A. Pratt, of Oberlin aforesaid, of lawful age, being first duly sworn by me, as hereinafter certified, deposes as follows:

Int. 1. Please to state your age, present place of residence, and occupation.

Ans. I am twenty-four years of age; I reside in Oberlin, Lorain county and State of Ohio, and am a student.

Int. 2. Whether or not you were acquainted with the late Mrs. Abigail Loring, of Boston, widow of Elijah Loring? If yea, for how long and in what manner?

Ans. I was acquainted with Mrs. Abigail Loring, widow of Elijah Loring, over seven years. I lived in the family of Mrs. Loring as a companion to her.

Int. 3. Whether or not did you live in her family? and, if so, how many years, and in what capacity? When did you leave, and for what reason?

Ans. I did live in her family over seven years, as the companion of Mrs. Loring. I left one year ago last June, for the reason that the family was broken up.

Int. 4. If you lived with her in the month of October, 1858, please to state whether or not she made a will at that time. Were you or not a witness thereto?

Ans. I lived with her at that time, October, 1858; and during that month she made her will, and I was a witness.

Int. 5. Whether or not, in the month of July, A. D. 1859, did she make a codicil thereto? If yea, did you witness that?

Ans. She made a codicil about July, 1859, and I witnessed it.

Int. 6. When did she decease?

Ans. She died in the month of November, A. D. 1862.

Int. 7. How many children had she living when her will was made, in October, A. D. 1858?

Ans. She had three children living at that time.

Int. 8. Whether or not any of the children of the said Abigail Loring living when her will was made, deceased before her? If so, which of them?

Ans. There were two of them that died after her will was
37 made, and before she died, to wit, Josiah Q. Loring and Cornelia W. Thompson.

Int. 9. If you have said that she had a son, Josiah Q. Loring, who deceased after her will was made, and before her, please to state whether or not he was married; if so, when and to whom, and whether or not he left children living when the will was made, and who survived his mother.

Ans. Josiah Q. Loring was married; cannot tell when, it being before I went to live in the family. He was married to the daughter of Dr. Renton; he left children living when the will was made, and they survived his mother.

Int. 10. At the time the said will was made what intercourse, if any, existed between the said Abigail, her said son and his wife and children, and her family?

Ans. The son frequently called at the house about the time the will was made, and frequently dined, and stayed most of the day; always visiting his mother when he came, but no communication whatever was had with the wife or children—with the family.

Int. 11. Whether or not any change, in this respect, occurred before her decease; if so, when, at what times? and describe such change or changes, if any.

Ans. No change took place before her decease, except that Abby Loring occasionally called and inquired after her grandmother's health.

Int. 12. Whether or not said Abigail was an invalid for some time before her decease; if so, for how long, and to what extent—was she or not confined to her house or room? what was the matter with her?—[whether or not her mind was affected?]

(Clause in brackets objected to.)

Ans. She was an invalid for some time before her decease; during all the time I lived with her she was confined to the first story of the house, being troubled with paralysis in her hands and feet.

(Deponent states that her mind was perfectly clear.)

Int. 13. During the time inquired of in the last interrogatory was she or not in the habit of seeing the members of her household and visitors? Please to state the names of all persons who lived in the house, which of them she was in the habit of seeing, and which
38 most frequently; also the names of all the persons living out of the house whom she was in the habit of seeing.

Ans. She was not in the habit of seeing the members of her household, except her daughter, only when she had business with them. Visitors called to see her but seldom, except a few of her old acquaintances who called occasionally. Mrs. Preston and James lived in the house, and Mrs. Griffin and Elizabeth Lewis were employed in the family to assist in doing the housework—boarding in the family when they were at work, but did not lodge there; there was also a young man by the name of Thomas Roach, was a student at the blind asylum, who spent his vacations with the family. She was in the habit of seeing Mrs. Preston, James, and Mrs. Griffin—Mrs. Preston most frequently; and of those persons living out [of] the house, Mr. Switcher, Mrs. Bartlett; and a lady that they called Matilda, who lived in Cambridge, was in the habit of seeing her, and who lived out of the house.

Int. 14. What was your personal relation to her, if any? How much, if at all, did you habitually see her?

Ans. No relation existing between deponent and her. Was with her all the time, except when absent to meals, from the time she arose in the morning until she retired at night, except when doing a few chores.

Int. 15. Whether or not did you ever hear her express any intention as to whether the children of her said son Josiah should or should not derive any benefit from her estate after her decease? Please to state all that you have heard her say upon this subject, giving the language used as nearly as possible.

Ans. I have frequently heard her say that Josiah's children should not derive any benefit from her estate after her decease. This I have often heard her say; cannot state the precise language used.

Int. 17. Was such intention expressed, if at all, more than once? If so, how often?

(July 28, 1864. Further examination of said Eliza A. Pratt was had before the undersigned, at the place above specified.)

Ans. It was expressed very often; so often that I cannot remember the number of times that she used expressions to that effect.

Int. 17. Was it expressed, if at all, before or at the time when the will was made, or when the codicil was made, or afterwards?

39 Ans. It was expressed before the will was made, I think, and about the time the will was made I heard her make such expressions frequently, and also at the time and after the codicil was made.

Int. 18. Did she, or not, ever express any change of such intentions? If so, when and how?

Ans. She never did express any change of her intentions on this subject.

Int. 19. Do you or not recollect that anything was said on this subject at or about the time the codicil was made? If yea, repeat it.

Ans. I do recollect that a few days before the codicil was made, and after Mrs. Thompson's death, Mrs. Loring stated to her daughter, Miss Abby M. Loring, in my hearing, that Josiah Q. Loring should have the part of her property intended for him, during his lifetime,

and that after his decease it should go for the benefit of institutions, and that would prevent any of the Renton family from getting it, and Josiah's children.

Int. 20. Whether or not did you ever hear her say whether or not her said son should have his part of her property during his life, and whether or not his children should have any part thereof, or to that effect? If yea, please to state when she so said to them, in whose presence, and give the language used by her.

(Objected to as leading.)

Ans. I heard her say that he should have it during his life, as above stated, and that his children should not have any after his decease. This statement was made just before the execution of the codicil, in the presence of her daughter. The language is given in the answer to the nineteenth question, as near as I can recollect.

Int. 21. Whether or not, when the will was made, did she know that the said Josiah Q. had children living? whether or not she continued in such knowledge up to the time of her decease? whether or not they were brought to the house? If so, how frequently? Did she not always see them at such times?

Ans. She did know at the time the will was made that Josiah Q. had children living; she continued in such knowledge up to the time of her decease; the children came to the house a few times before her death; they did not go to see her but on one occasion, to my knowledge.

40 Int. 22. Whether or not she was habitually fond of children? If so, how did she show it? Was she or not fond of the children of her said son?

(Objected to as leading.)

Ans. She was not visited by children much; deponent cannot state whether or not she was habitually fond of children, but whenever children were brought to see her she was in the habit of caressing them and giving them presents; was not accustomed to express any affection for her son Josiah Q.'s children.

Int. 23. If you have said or intimated that Mrs. Loring disliked the family of her son's wife, and would have no intercourse with them; and if you have heard her express the reasons of such dislike, please state them fully, and whether or not they continued up to the time of her decease.

Ans. I have intimated and stated that Mrs. Loring disliked the family of her son's wife, judging from her words and actions, and there was no intercourse between the families. I have heard her express the reasons of such dislike, she stating that they were a bad, wicked set, capable of doing anything, and having no principle; and that these feelings continued during her life.

Int. 24. Do you know, or can you set forth, any other matter or thing which may be a benefit to the parties at issue in this case, or either of them, or that may be material to the subject of this examination, or the matters at question in this cause? If yea, set forth the same fully and at large in your answer.

Ans. I do not recollect anything further at this time that will be material to the issue in this case.

Cross-interrogatories in behalf of complainants:

Cross-int. 1. How old was you when Mrs. Abigail Loring died?

Ans. My age was twenty-two years when she died?

Cross-int. 2. After the death of Mrs. Abigail Loring, did you not live with her daughter, Miss Abby M. Loring, as a servant?

Ans. Yes; and as companion, confidante, or anything she chose to make me.

41 Cross-int. 3. Have you stated, in your answer to the third direct interrogatory, all your duties while you lived in the family of Mrs. Abigail Loring? If not, state fully exactly what you did while living in the family.

Ans. I was constantly with her, except when I was to my meals, waited upon her, took care of her room, waited upon the door when visitors called, and did everything about her person. I also helped water the flowers, took care of the birds, and washed the breakfast and tea china, and did other chores, but was seldom absent more than a half hour at a time.

Cross-int. 4. If you have, in answer to any of the direct interrogatories, stated anything that Mrs. Abigail Loring said at any time or times, state the time at which she said the same, and who was present at each time.

Ans. For answer deponent refers to the answers in the nineteenth and twentieth interrogatories in the direct examination. Cannot state more definitely when, except that it was in the forepart of the day, between seven and eight o'clock.

Cross-int. 5. Have you stated the exact words used by Mrs. Loring?

Ans. I have, as near as I can remember.

Cross-int. 6. If you have attempted to state Mrs. Loring's exact words in any instance, state which; state the exact words that Mrs. Loring used on any of the occasions in regard to which you have testified in your direct examination—when, and who was present.

Ans. Deponent refers to her answers to the nineteenth and twentieth interrogatories in the direct examination as an answer to this last question.

Cross-int. 7. If in answer to the fifteenth direct interrogatory you have attempted to say that you heard Mrs. Loring "express any intention" on the subject referred to in said interrogatory, have you stated the exact words she used?

Ans. Have frequently heard Mrs. Loring say that Josiah's children should not derive any benefit after her decease; cannot state the precise language; was accustomed to hear language of this or similar

42 import; did not expect to be called upon to testify in the matter, and did not charge my memory with the exact language used.

Cross-int. 8. Can you state the language she used?

Ans. I cannot state the exact words.

Cross-int. 9. When did she "express any intention?" (if you in answer to the fifteenth direct interrogatory have testified to anything of the kind.) Who was present on each occasion, if more

than one? Give the names of all the persons who were present. What time in the day was it?

(July 29, 1864. Further examination of said Eliza A. Pratt was had before the undersigned at the place above specified.)

Ans. Cannot state the number of times she expressed her intentions in reference to this matter, but quite often in the presence of her daughter and Mrs. Thompson. She did not converse on family affairs to visitors. I distinctly recollect the conversation stated in the answer to the twentieth direct interrogatory; no one present except Miss Abby Loring, in the room where the conversation was had; deponent was in the hall dusting it; it was in the forepart of the day, as previously stated; I should think between seven and eight o'clock.

Cross-int. 10. Who were the other witnesses to the will and codicil of Mrs. Loring?

Ans. Mr. Russell and Patrick Wheeler were also witnesses to the will. Mr. Russell was witness to the codicil, and think Patrick Wheeler was also a witness, but am not positive.

Cross-int. 11. Was there anything said by Mrs. Loring at the time of signing either the will or codicil?

Ans. There was nothing said by Mrs. Loring at the time of signing either the will or codicil.

Cross-int. 12. Did not the children of Mrs. Loring's son, Josiah Q. Loring, visit Mrs. Loring frequently during the six months before her death?

Ans. They did not come frequently; they came, however, a few times; do not recollect of their being at her room but once, and at this time she seemed unwilling to see them.

Cross-int. 13. Did not Mrs. Loring, during the year previous to her death, send several times for the children of her son, Josiah Q. Loring?

Ans. No, she never did.

43 Cross-int. 14. During the six months previous to her death, was not Mrs. Loring pleased to see said children, and did she not have them in her room several times?

Ans. No, she did not seem pleased to see them; they did not visit the room but once in that time, as I can remember.

Cross-int. 15. When did Miss Abby M. Loring, daughter of said Mrs. Loring, die? Were you living with her as a servant at the time of her death?

Ans. Miss Abby M. Loring died in June, 1863. I was living with her at the time.

Cross-int. 16. Where have you lived since the death of Miss Abby M. Loring?

Ans. I remained at Mrs. Gwynne's, 24 Kneeland street, Boston, Massachusetts, after the death of Miss Abby M. Loring, until the first of September following; removed at that time to Oberlin, Ohio, and have lived here since that time.

Cross-int. 17. What have you been doing for the last six months? If at school, who pays your expenses?

Ans. Have been studying; and the friends of Miss Abby M. Loring have presented me with the amount of money necessary to pay my expenses.

Cross-int. 18. Have you, since the death of Miss Abby M. Loring, had conversation with any person or persons about testifying in this case? If yea, answer.

Ans. I have had no conversation with any one in reference to this matter.

Cross-int. 19. Do you know Mr. Levi H. Marsh, of Boston? Have you talked with him about testifying in this case? Have you received any letter or letters from him in regard to it? If yea, annex the same, or copies of the same, to your deposition.

Ans. I know Mr. Levi H. Marsh; have had no conversation with him about testifying in this case. I have received three letters from him on the subject, which are annexed to this deposition, and marked "A," "B," and "C."

Cross-int. 20. Have you received any letters from any other person in regard to testifying in this case?

Ans. No, I have not.

44 Cross-int. 21. What period of time do you understand is referred to in the twelfth and thirteenth interrogatories?

Ans. From the time deponent went to Mrs. Abigail Loring's to live until her death, which was in November, A. D. 1862.

Cross-int. 22. *(De bene esse.)* If the clause objected to in the twelfth direct interrogatory should be held unobjectional, or the objection be withdrawn, what do you understand is meant by "her mind being affected?" and when, and during what period of time, do you say it was so, if at all?

Ans. Her mind was perfectly clear during all the time I was acquainted with her, up to the last hours of her life; took an interest in everything going on around her; judgment apparently as good as it was in the prime of life; and further this deponent saith not.

ELIZA A. PRATT.

A.

BOSTON, *May* 9, 1864.

Miss Eliza A. Pratt:

Before you left here, you recollect that no will of Miss Abby M. Loring's was found, and that Dr. Renton had taken possession of her house and all her other property. The house has since been sold, and strangers have moved in. Dr. Renton has sent Mrs. Josiah Q. Loring and her three children to New York, and brought a suit against me for all of Mrs. Abigail Loring's property, to prevent its being paid over to the poor, as the old lady intended it should go, as stated in her will.

My object in writing is to ascertain if you remember ever having heard her say at any time that "she did not mean that Dr. Renton's family should have any of her money," or "that she disliked them,' or any expressions of that nature. Try to recollect, if you please,

whether she ever expressed herself to that effect to you, or in your hearing; and please write to me on this subject as soon as possible, stating what you remember.

I hope your school at Oberlin has been a pleasant one, and that when you return you will be able to teach others, and gain a very respectable livelihood. You have many friends and well-wishers, and you will consider me among them.

I called at Mrs. Gwynne's to learn how to address my letter to you. Hoping in a few days to receive a letter from you, I remain, yours truly,

LEVI H. MARSH.

If you think of any persons to whom Mrs. Loring may have said that she was unwilling that Dr. Renton's family should have her property, please mention their names. It is quite important to obtain this evidence, if possible.

Direct your letter to "Levi H. Marsh, Boston, Mass."

B.

BOSTON, *8th June*, 1864.

Miss Eliza A. Pratt:

I have received your letter, and thank you for it. As you thought that something further might recur to your memory, I write to ask if you do remember anything more, and, if you do, to request you to state it in an early reply to my present letter.

And, further, to inquire if there is any commissioner of a United States court residing in or about Oberlin; and, if so, to send me his name; and, if not, the name of some respectable lawyer, being a notary public or justice of the peace. My legal adviser wishes me to get this information, that he may send out and have your deposition taken, as it seems to be important.

Please answer without delay.

Yours, very respectfully,

LEVI H. MARSH.

C.

BOSTON, *July 18th*, 1864.

Miss Eliza A. Pratt:

By this mail a commission, containing questions to you concerning the late Mrs. Loring, her will, intentions, &c., has been forwarded to Mr. Langsten, and, in case of his absence, to Mr. Prentiss, to take your testimony in the lawsuit pending here. One of them will appoint a time and place for taking down your answers, which please make as full and explicit as your recollection may enable you.

Very respectfully, yours, &c.,

LEVI H. MARSH.

I, J. B. Prentiss, J.P., of Oberlin, Lorain county, Ohio, and commissioner appointed by the circuit court of the United States within

and for the Massachusetts district, do hereby certify that the foregoing-named Eliza A. Pratt was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the foregoing deposition, by her subscribed, was reduced to writing by me, and by said witness subscribed in my presence; and was taken on the days and place specified in the deposition, in pursuance of the commission herewith forwarded.

In testimony whereof, I have hereunto set my hand this thirtieth day of July, A. D. 1864.

BARNEY PRENTISS, *J. P.*,
and Commissioner aforesaid.

47 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

To Peter Renton, of Boston, in the county of Suffolk, aforesaid, physician; Abby M. Loring, Marion W. Loring, and Elijah James Loring, of Weston, in the county of Middlesex, minor children of Josiah Quincy Loring, deceased; The Massachusetts General Hospital, The Boston Provident Association, The Association for the Relief of Aged Indigent Females, The Boston Dispensary, The Boston Asylum and Farm School for Indigent Boys, The Howard Benevolent Society, The Warren Street Chapel, The Sailors' Snug Harbor, The Temporary Home for the Destitute, The Seaman's Aid Society, The Boston Seaman's Friend Society, The Massachusetts Charitable Eye and Ear Infirmary, The Boston Female Asylum, The Church Home for Orphan Destitute Children, The Young Men's Benevolent Society, The Boston Children's Friend Society, The Boston Society for the Prevention of Pauperism, The Boston Fatherless and Widows' Society, The Needlewoman's Friend Society, St. Stephen's Chapel, The Home for Aged Men, St. Mary's Chapel, all corporations duly incorporated by the Commonwealth of Massachusetts, in Boston, aforesaid, greeting:

We command you that you appear before the clerk of our supreme judicial court, at the rules to be holden at his office in Boston, within our said county of Suffolk, on the first Monday of March next, then and there to answer to a bill of complaint, exhibited against you in our said court by Levi H. Marsh, of said Boston, as he is executor and trustee under the will of Abigail Loring, late of said Boston, widow, deceased.

Hereof fail not, under the pains and penalties in the law in that behalf provided.

Witness, George T. Bigelow, esquire, at Boston, the sixteenth day of January, in the year of our Lord one thousand eight hundred and sixty-four.

GEORGE C. WILDE, *Clerk.*

48 BOSTON, *January* 16, 1864.

SUFFOLK, *ss:*

By virtue hereof I this day summoned the within-named Peter Renton to appear and answer at court, by leaving an attested copy of this precept at his last and usual place of abode.

BENJ. F. BAYLEY, *Deputy Sheriff.*

JANUARY 16, 1864.

MIDDLESEX, *ss:*

By virtue hereof I this day summoned the within-named Abby M. Loring, Marion W. Loring, and Elijah James Loring to appear and answer at court, as within commanded, by leaving an attested copy of this precept at each of their last and usual places of abode.

JNO. B. DEARBORN, *Deputy Sheriff.*

BOSTON, *February* 4, 1864.

SUFFOLK, *ss:*

By virtue hereof I this day summoned the within-named Warren Street Chapel, The Asylum and Farm School, The Church Home for Orphan Destitute Children, The Massachusetts Charitable Eye and Ear Infirmary, The Sailors' Snug Harbor, The Temporary Home for the Destitute, The Boston Provident Association, The Association for the Relief of Aged and Indigent Females, The Boston Dispensary, The Home for Aged Men, to appear and answer at court, by delivering attested copies of this precept to F. C. Loring, esq., president of said Warren Street Chapel, George H. Kuhn, esq., treasurer of the said Farm School Asylum; John Jeffries, jr., treasurer of the Church Home for Orphan and Destitute Children; I. W. Edwards, esq., treasurer of Massachusetts Eye and Ear Infirmary; Wm. A. Wellman, esq., treasurer of the Sailors' Snug Harbor; Thomas T. Bourne, esq., treasurer of the Temporary Home for the Destitute; John A. Loring, esq., treasurer of the Boston Provident Association; Charles C. Barry, esq., treasurer of the Association for Aged and Indigent Females; F. E. Parker, esq., treasurer of the Boston Dispensary; Moses Mellen, treasurer of said Home for Aged Men. And on the 5th day of said February I summoned the within-named Boston Female Asylum, The Young Men's Benevolent Society, The Boston Children's Friend
49 Society, The Boston Fatherless and Widows' Society, The St. Mary's Chapel, The St. Stephen's Chapel, The Boston Seaman's Friend Society, The Howard Benevolent Society, The Needlewoman's Friend Society, to appear and answer at court, by delivering attested copies of this precept to Miss S. C. Paine, treasurer of said Boston Female Asylum; F. W. Lincoln, jr., esq., treasurer of said Young Men's Benevolent Society; Mrs. Susan D. Reynolds, treasurer of said Children's Friend Society; Mrs. Susan D. Reynolds, treasurer of said Fatherless and Widows' Society; Peter Wainwright, esq., treasurer of said St. Mary's Chapel; James C. Merrill, esq., treasurer of said St. Stephen's Chapel; Thomas D. Quincy, treasurer of said Seaman's Friend Society; Robert B. Storer, treasurer of said Howard Benevolent Society; Miss E. S. Whiting, treasurer of the said Needlewoman's Friend Society. And on the 5th day of said February I summoned the within-named Massachusetts General Hospital and The Seaman's Aid Society to appear and answer at court, by delivering attested copies of this precept to J. Thomas Stevenson, treasurer of said Massachusetts General Hospital, and to Sarah A. Minus, treasurer of said Seaman's Aid Society. And on the 20th day of said February I summoned the within-named Boston Society for the Prevention [of]

Pauperism to appear and answer at court, by delivering an attested copy of this precept to C. H. P. Plimpton, esq., treasurer of said Society.

BENJ. F. BAYLEY, *Deputy Sheriff.*

Supreme judicial court.

SUFFOLK, *ss:*

To the honorable the justices of the supreme judicial court, sitting in equity, in Boston, in and for the county of Suffolk:

The bill of complaint of Levi H. Marsh, of said Boston, as he is executor and trustee under the will of Abigail Loring, late of said Boston, widow, deceased, showeth that the said Abigail Loring made her
50 last will and testament on the nineteenth day of October, in the year eighteen hundred and fifty-eight, and a codicil thereto on the fourteenth day of July, A. D. eighteen hundred and fifty-nine; and that said will and codicil were duly admitted to probate in the probate court for the said county of Suffolk on the eighth day of December, in the year eighteen hundred and sixty-two. That by said last will and codicil, the said Abigail, after the payment of cerrain bequests therein mentioned, gave all the rest, residue, and remainder of all her estate and property, real and personal, unto your orator and Samuel E. Guild, counsellor at law, of said Boston, and the survivor of them, in trust, to pay over the income thereof to her surviving children, one-half to her daughter, Abby M. Loring, and the other half to her son, Josiah Q. Loring, during their respective lives, and upon the death of the survivor of them that the said trust fund and all accumulation of income should be disposed of for the benefit of the poor. And the said Abigail further directed, by her said last will and codicil, that the said Marsh and Guild, or their successors, should select and appoint three or more gentlemen, who should be informed of the facts by the trustees, and who should determine how, by payments to permanently-established incorporated charitable institutions, her wish to benefit the poor would be best carried into effect, and her gift might be made most productive of benefit to the poor, and that, therefore, said trust fund, including the share of income retained, should be disposed of and paid over, in accordance with the determination of said gentlemen so appointed, certified by them in writing, to the said trustees, all of which will more fully appear by the copy of said will and codicil hereto annexed. And the said Abigail appointed your orator as executor of her said last will and testament.

And your orator further showeth that he accepted said trust, and was duly appointed by said probate court for the county of Suffolk executor of said last will and testament of said Abigail, on the eighth day of December, in the year eighteen hundred and sixty-two, and that, on the twenty-fourth day of August, in the year eighteen hundred and sixty-three, he was appointed by said court soletrustee under the said last will and testament of said Abigail, the said Samuel E. Guild, the other trustee named in said will, having deceased.

51 And your orator further showeth that said parties having said life-estate have deceased, and that after said decease, in accordance with the provisions in said last will and testament of said Abigail, and as the sole surviving trustee of said Abigail, he did select and appoint Charles G. Loring, Robert C. Winthrop, and Henry B. Rogers, all of said Boston, as the three gentlemen who should determine the payments to be made to permanently-established incorporated charitable institutions for the benefit of the poor. And that the said Charles G. Loring, Robert C. Winthrop, and Henry B. Rogers accepted said appointment, and were informed of the facts by your orator, and did carefully consider said matter, and did advise, make, and declare in writing, to your orator the distribution of said trust fund amongst the following permanently-established incorporated charitable institutions, to wit:

1. To the Massachusetts General Hospital the sum of thirty thousand dollars, and the balance of the fund, if any shall remain of all the amount herein awarded, not to exceed, however, the further sum of five thousand dollars, to be appropriated entirely for free beds.

2. To the Boston Provident Association the sum of fifteen thousand dollars, to be invested as a permanent fund to be called the Loring fund, the income to be appropriated to defray the expenses of the corporation so long as it shall continue in operation and need that amount or more; the surplus, if any, to be appropriated for the general purposes of the institution.

3. To the Association for the Relief of Aged Indigent Females the sum of thirteen thousand dollars, to be set apart as a separate fund to be denominated the Loring fund, the income to be for the general use of the association.

4. To the Boston Dispensary the sum of five thousand dollars.

5. To the Boston Asylum and Farm School for Indigent Boys the sum of ten thousand dollars.

6. To the Howard Benevolent Society the sum of ten thousand dollars, to be invested as a permanent fund and denominated the Loring fund; upon condition, however, that such portion of the income thereof as may be needed shall be appropriated to the semi-annual assistance and relief of the persons whom the testatrix and her daughter, Miss Abby M. Loring, were, or either of them was,
accustomed to assist or relieve, and who shall be named in the
52 list thereof, signed by the executor and delivered to said society on payment of the fund, or whose names he may subsequently add thereto.

7. To the Warren Street Chapel the sum of eight thousand dollars.

8. To the Sailors' Snug Harbor the sum of eight thousand dollars.

9. To the Temporary Home for the Destitute the sum of ten thousand [*thousand*] dollars, to be invested as a personal fund denominated the Loring fund, the income to be used for the general purposes of the institution.

10. To the Seaman's Aid Society the sum of five thousand dollars, to be appropriated exclusively in relieving the necessities of the des-

titute seamen and their families, and not for the purpose of maintaining homes, or chapels, or religious teachings, &c., or any other general purposes.

11. To the Boston Seaman's Friend Society the sum of five thousand dollars, to be *to be* appropriated exclusively in relieving the necessities of destitute seamen and their families, and not for the purpose of maintaining homes, or chapels, or religious teachings, &c., or any other general purpose.

12. To the Massachusetts Charitable Eye and Ear Infirmary the sum of four thousand dollars.

13. To the Boston Female Asylum the sum of five thousand dollars, to be set apart as a separate fund to be denominated the Loring fund, the income to be appropriated to the general purposes of the institution.

14. To the Church Home for Orphan and Destitute Children the sum of five thousand dollars.

15. To the Young Men's Benevolent Society the sum of four thousand dollars.

16. To the Boston Children's Friend Society the sum of three thousand dollars.

17. To the Boston Society for the Prevention of Pauperism the sum of three thousand dollars.

18. To the Boston Fatherless and Widows' Society the sum of ten thousand dollars, as a permanent fund denominated the Loring fund, upon condition, however, that such portion of the income thereof as may be needed for the purpose shall be appropriated to the semi-annual assistance and relief of the persons whom the testatrix and her daughter, Miss Abby M. Loring, were, or either of them
53 was, accustomed to assist or relieve, and who shall be named in the list thereof, signed by the said executor and delivered to said society on payment of the fund, or whose names he may subsequently add thereto.

19. To the Needlewoman's Friend Society the sum of five thousand dollars, to be invested as a permanent fund denominated the Loring fund, and the income to be applied to the general purpose of the society.

20. To St. Stephen's Chapel the sum of five thousand dollars, two thousand for the purpose of two free beds at the Massachusetts General Hospital for the use of the chapel, and the remaining three thousand to be used at the discretion of the corporation.

21. To the Home for Aged Men the sum of five thousand dollars.

22. To St. Mary's Chapel the sum of three thousand dollars.

The aggregate of the above-awarded sums is one hundred and seventy-one thousand dollars. If the funds should prove insufficient for payment of all of them we direct a pro rata apportionment of the deficiency. If it should exceed that aggregate in any amount not beyond five thousand, we appoint such excess to be paid to the Massachusetts General Hospital for the purchase of free beds; and if the excess should exceed five thousand dollars, the residue is to be subject of future disposal by us.

As will more fully appear, by a copy of the said proposed distribution and determination to be filed in court, of said Loring, Winthrop, and Rogers, duly made and certified by them in writing to your orator; and your orator assented to and accepted the same.

And your orator further states that said charitable institutions are situated in, and incorporated by, the Commonwealth of Massachusetts; that he is ready to transfer, assign, and pay over to the institutions aforesaid the respective sums of money directed by said Loring, Winthrop, and Rogers to be paid to said institutions, in the manner and upon the conditions in their said award and distribution. All of which became known to said several institutions.

But your orator further showeth that at the time of the decease of said Abigail Loring, Abby M. Loring, Marion W. Loring, and Elijah James Loring, all of Weston, in the county of Middlesex and State of Massachusetts, grandchildren of said Abigail, and
54 children of said Josiah Quincy Loring, deceased, and all under the age of twenty-one years, were her sole heirs at law and next of kin, and entitled to her personal estate by the laws of this Commonwealth, if she had died intestate; and that Peter Renton, physician, of said Boston, was the duly appointed guardian of said minors, under and by virtue of the appointment of the court of probate for the county of Middlesex.

And your orator further states that said Renton, as guardian as aforesaid, and said minor children of said Josiah Quincy Loring, deceased, have demanded of your orator the transfer, conveyance, and payment to them of the various moneys and estates in the hands of your orator, as trustee under the will of the said Abigail, claiming to be entitled to the full possession and enjoyment of the same, alleging that said bequest of the said Abigail for the benefit of the poor is null and void by reason of vagueness and uncertainty, and for other reasons.

And your orator further states that he is informed, and believes, that said Warren Street Chapel and others of the said institutions named in said distribution, made as aforesaid, were not incorporated at the time of the decease of said Abigail and when her will was admitted to probate, but that said institutions have since been, and before said award and determination of Loring and others, incorporated. And your orator is advised that it is doubtful whether he can safely and legally pay over to said institutions, incorporated as aforesaid since the decease of said Abigail, any portion of her said estate.

And your orator further states that he is ready to convey, transfer, and pay over said trust estate to whomsoever is entitled thereto. But by reason that all said parties persist in the several adverse claims before mentioned, and the said Peter Renton, guardian as aforesaid, threatens and intends to proceed at law against your orator for enforcement of said claims, your orator is advised that he cannot safely convey, transfer, and pay over the said trust estate to any of said parties; but that they ought to interplead together touching their right to the same, in order that your orator may know to whom the same ought to be conveyed, transferred, and assigned; and that

the said parties ought to be restrained by the order and injunction of the court from prosecuting, proceeding in, or commencing any action or actions at law against your orator for or in respect to the matter aforesaid.

55 Wherefore your orator prays for the instruction of this honorable court, and that the said defendants may be decreed to interplead together, as aforesaid; and that it may be ascertained, in such manner as the court shall direct, to which of them the said trust estate ought to be conveyed, transferred, and assigned; and that your orator may be at liberty to pay the moneys now in his possession or control belonging to said trust estate into court, which he offers to do for the benefit of such of the said parties as shall be entitled thereto. And that the said parties defendant may in the mean time be restrained from proceeding in prosecuting or commencing any action or actions at law against your orator in respect of the matters aforesaid, and that all costs and expenses incurred by your orator herein may be allowed and paid to him from the said trust estates, and that your orator may have such further and other relief as the nature of the case may require.

May it please your honors to grant unto your orator a writ of subpœna directed to the said Massachusetts General Hospital, the Boston Provident Association, the Association for the relief of Aged Indigent Females, the Boston Dispensary, the Boston Asylum and Farm School for Indigent Boys, the Howard Benevolent Society, the Warren Street Chapel, the Sailors' Snug Harbor, the Temporary Home for the Destitute, the Seaman's Aid Society, the Boston Seaman's Friend Society, the Massachusetts Charitable Eye and Ear Infirmary, the Boston Female Asylum, the Church Home for Orphan and Destitute Children, the Young Men's Benevolent Society, the Boston Children's Friend Society, the Boston Society for the Prevention of Pauperism, the Boston Fatherless and Widows' Society, the Needlewoman's Friend Society, St. Stephen's Chapel, the ——— Home for Aged Men, St. Mary's Chapel, Peter Renton, Abby M. Loring, Marion W. Loring, and Elijah James Loring, commanding them at a certain time and place, and under a certain penalty, to be before your honors, and then and there full answer to make to all and singular the premises, and to stand to, abide, and perform such order, direction, and decree, as to your honors shall seem meet.

LEVI H. MARSH.

C. W. LORING, *Solicitor.*

56 And now the said Marsh makes oath and saith that the matters stated in said bill, of his own knowledge, are true, and that the other matters stated are true to the best of his information and belief. and that this bill is not filed in collusion with either of the defendants in the said bill named, but merely of his own accord, for relief in this honorable court.

Before me—

C. W. LORING, *Justice of the Peace.*

Filed Jan. 16, 1864. Attest:

GEO. W. NICHOLS, *Ass't Clerk.*

Supreme judicial court.

LEVI H. MARSH, ex'r,
vs.
PETER RENTON, and *als.*

And now the said complainant amends his bill as follows: by striking out the clause on the tenth page, beginning "But," and inserting this:

But your orator further shows that, at the time of the decease of the said testatrix, her heirs at law and next of kin were a daughter, Abby M. Loring, since deceased intestate, of whose estate Peter Renton, of said Boston, physician, has been duly appointed administrator, and Abby M. Loring, Marion W. Loring, and Elijah J. Loring, children of a deceased son, infants under the age of twenty-one years, all of Boston, in the county of Middlesex, of whom the said Peter Renton is the duly appointed guardian by the court of probate for the county of Middlesex, and that the said Abby M. Loring and the said infants would have been entitled to the personal estate of the said testatrix, if she had deceased intestate.

And by inserting on the 11th and 12th pages the words "administrator and" after guardian; and on the 14th page the words "administrator and guardian."

F. C. LORING, *for Complainant.*

Filed Oct. 17, 1864, and allowed. Attest:

G. C. WILDE, *Clerk*

57 Supreme judicial court.

SUFFOLK, *ss:*

LEVI H. MARSH
vs.
PETER RENTON, and al.
} In equity.

The answer of Peter Renton, one of the defendants to the bill of complaint of Levi H. Marsh.

This defendant, for answer to so much of said bill of complaint as he is advised is material for him to make answer unto, says that he admits that Abigail Loring, late of Boston, in the county of Suffolk, deceased, made her last will and testament on the nineteenth day of October, A. D. eighteen hundred and fifty-eight, and a codicil thereto on the fourteenth day of July, A. D. eighteen hundred and fifty-nine, and that said will and codicil were duly admitted to probate in the probate court for said county of Suffolk on the eighth day of December, A. D. eighteen hundred and sixty-two.

And this defendant, further answering, admits that Abby M. Loring, Marion W. Loring, and Elijah James Loring are grandchildren of the said Abigail Loring, and her sole heirs at law, and all minors under the age of twenty-one years, and that this defendant was, on the twenty-second day of April, A. D. eighteen hundred and sixty-two, appointed by the probate court for the county of Middlesex guardian of said minors, the said minors being at the time of his appointment residents of Weston, in said county.

And this defendant, further answering, says that after his said appointment of guardian of said minors, and before the filing of the complainants' bill of complaint, the said Abby M. Loring, Marion W. Loring, and Elijah James Loring, with their mother and natural guardian, Christian W. R. Loring, removed from this Commonwealth and became and were at the time of the *time of the* filing of said complainants' bill of complaint residents and citizens of the State of New York, and had no place of abode in this Commonwealth; that there has been no personal or other service of the subpœna in this case on the said Abby M. Loring, Marion W. Loring, and Elijah James Loring, nor any legal notice to them of the pendency of this suit.

58 And this defendant, further answering, says that the said Abby M. Loring, Marion W. Loring, and Elijah James Loring, by their mother and next friend, Christian W. Loring, on the eighteenth day of January, A. D. 1864. filed their bill of complaint in the circuit court of the United States for the district of Massachusetts against the said Levi H. Marsh and this defendant, as administrator of the estate of Abby M. Loring, late of said Boston, deceased, as in fact he was, the said Abby M. Loring being a daughter of the said Abigail Loring, having survived her mother, and being one of her heirs at law and next of kin, and having died unmarried and intestate, a copy of which bill of complaint is hereto annexed, and which this defendant prays may be taken as part of this his answer. And the said Marsh appeared and answered to said bill, and the cause is now at issue.

And this defendant, further answering, submits to this honorable court whether he is properly joined as a party defendant to the said bill, and prays that, as to him, the said bill may be dismissed; and he prays that he may have the same benefit of this objection as if the same had been taken by way of plea or demurrer to the said bill.

Without this, that there is any other matter, cause, or thing in the complainants' said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true, to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges on his behalf wrongfully sustained.

PETER RENTON.

59 APRIL 9, 1864.

SUFFOLK, *ss:*

Then personally appeared the abovenamed Peter Renton, and made oath that he had read the above answer by him subscribed, and that the same is true of his own knowledge, except as to such matters therein stated upon his information and belief; and as to those matters, he believes it to be true.

Before me—

A. S. WHEELER, *Justice of the Peace.*

Filed April 25, 1864. Attest:

GEO. W. NICHOLS, *Ass't Clerk.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk:*

I, Geo. W. Nichols, assistant clerk of the supreme judicial court within and for said county of Suffolk, hereby certify that the foregoing is a true copy of the subpœna of the return of service thereon of the bill without the exhibits, the amendments thereto, the answer of the defendant Peter Renton, without the exhibits in the suit in equity of Levi H. Marsh, ex'r, complainant against Peter Renton and als., defendants, now pending in said court.

In witness whereof, I have hereto set my hand and affixed the seal of said court, this twentieth day of October, A. D. 1864.

[SEAL.] GEO. W. NICHOLS, *Ass't Clerk.*

60 UNITED STATES OF AMERICA, *Massachusetts district, ss:*

I, John G. Stetson, clerk pro tem. of the circuit court of the United States for the first circuit, Massachusetts district, do hereby certify that the foregoing papers, numbered one (1) to fifty-nine (59) inclusive, are a true and full copy of the record and of all proceedings in the cause of Abby R. Loring *et al.*, complainants in equity, *versus* Levi H. Marsh *et al.*, defendants, (including all the evidence used at the hearing of said cause.)

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at Boston, in said district, this twentieth day of October, in the year of our Lord one thousand eight hundred and sixty-five, and in the independence of the United States the ninetieth.

[SEAL.] JOHN G. STETSON, *Clerk pro tem.*

61 Know all men by these presents, that we, Christian W. R. Loring, of the city, county and State of New York, as principal, and Robert R. Bishop and Thornton K. Lothrop, as sureties, holden and stand firmly bound and obliged unto Levi H. Marsh and others, defendants in the suit in equity in the United States circuit court for the district of Massachusetts, wherein Abby R. Loring, Marion W. Loring, and Elijah James Loring, infants, who sue by said Christian W. R. Loring, their mother and next friend, are complainants, and Levi H. Marsh and others are defendants, in the full sum of three hundred dollars, to be paid unto the said Levi H. Marsh and others, defendants as aforesaid, their executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators firmly by these presents. Sealed with our seal, dated the fourteenth day of October, in the year of our Lord one thousand eight hundred and sixty-five.

The condition of this obligation is such that, whereas in a suit in equity in the United States circuit court for the first circuit and district of Massachusetts, wherein Abby R. Loring, Marion W. Loring, and Elijah James Loring, infants, by their mother and next friend, Christian W. R. Loring, are complainants, and Levi H. Marsh and others are defendants, as by reference to the bill of complaint in said suit and the amendments thereto, will appear, the said complainants

have appealed from the final decree therein to the Supreme Court of the United States. Now, therefore, if the said appellants shall and do diligently prosecute such appeal, and shall and do pay all costs that may be awarded against them therein, then this obligation to be void; otherwise, to be and remain in full force and virtue.

C. W. R. LORING. [SEAL.]
ROBERT R. BISHOP. [SEAL.]
THORNTON K. LOTHROP. [SEAL.]

In presence of—
GEO. BRODIE.
W. C. VAN DORLISS, to T. K. L. and R. R. B.

Approved. F. C. LORING.
Approved. NATHAN CLIFFORD.
Associate Jus. Sup. Court U. S.

A true copy of bond, and of the approval thereof, on file in clerk's office, circuit court U. S., Mass. district.
[SEAL.] Attest: JOHN G. STETSON, *Clerk pro tem.*

Filed November 18, 1865.

68

have appealed from the final decree therein to the Supreme Court of the United States. Now, therefore, if the said appellants shall and do diligently prosecute such appeal, and shall and do pay all costs that may be awarded against them therein, then this obligation to be void; otherwise, to be and remain in full force and virtue.

C. W. R. LORING. [SEAL.]
ROBERT R. BISHOP. [SEAL.]
THORNTON K. LOTHROP. [SEAL.]

In presence of—
GEO. BRODIE.
W. C. VAN DORLISS, to T. K. L. and R. R. B.

Approved.
Approved.

F. C. LORING.
NATHAN CLIFFORD.
Associate Jus. Sup. Court U. S.

A true copy of bond, and of the approval thereof, on file in clerk's office, circuit court U. S., Mass. district.

[SEAL.] Attest: JOHN G. STETSON, *Clerk pro tem.*

Filed November 18, 1865.

Peter Hunter 68
[illegible] [illegible] [illegible] (note debt)
[illegible] 665

United States Supreme Court.

DECEMBER TERM, 1867.

LORING ET AL., APPELLANTS,

vs.

MARSH ET AL.

Summary of Points and Authorities for Appellants.

UNITED STATES SUPREME COURT.

DECEMBER TERM, 1867.

LORING, ET AL., APPELLANTS, *vs.* MARSH, ET AL.

Summary of Points and Authorities for Appellants.

THE facts in the cause are fully and accurately stated in the judgment of the Circuit Court, printed and herewith placed before the Court.

The principal question raised by the record is, Whether the Appellants, grandchildren of the Testatrix, are entitled, notwithstanding her will, to claim and hold as her heirs a moiety of her estate; and this depends on the Statutes of Massachusetts and their construction, by the highest tribunal of that State. Those Statutes are:—

Col. Stat. 12 Wm. 3d, 1700; Ancient Charters, p. 351;
Stat. 1783, ch. 29, sec. 8; 1 Mass. Laws, Ed. 1823, p. 92.
Revised Statutes (1836), chap. 62, sec. 21.
Gen. Stat. 1860, chap. 92, sec. 25–26.

All these Statutes are declared by the Supreme Court of Massachusetts to be re-enactments, varied merely by incorporating in the later the construction given by the Court to the earlier, with the simple exception that it has been decided that under the phraseology of Rev. Statutes oral evidence of the intentional omission of an heir is admissible.

Wilson *vs.* Fosket, 6 Met. 400.
Converse *vs.* Wales, 4 Allen, 512.

I.

The words of the Revised Statutes, ch. 62, sec. 21, which govern in this cause (since Testratrix died before 1860), are as

follows: — "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate, unless they shall have been provided for by the Testator in his lifetime, *or unless it shall appear that such omission was intentional and not occasioned by any accident or mistake*" (re-enacted in words by Gen. Stat. (1860), ch. 92, sec. 25).

By an unbroken series of decisions down to Rev. Stat. (1836) the Supreme Court of the State has given an uniform exposition of the true intent of the earlier Statutes (which have been altered by Revised Statutes only on the point of parol evidence of intentional omission, as above stated), which exposition is stated most clearly and fully in Wilder *vs.* Goss, 14 Mass. 357, thus: — "Whenever it appears that the Testator has, through forgetfulness or mistake, omitted to bestow anything upon his child or grandchild, the Legislature wisely intended to effect that which it is highly reasonable to believe the Testator, but for such forgetfulness, would himself have done. To go further than this would be in its measure to defeat the principal intention of the Legislature in the first section of the Statute, which authorizes every person seized of an estate * * * * * to devise the same as he shall think fit. *Whenever then it may fairly be presumed from the tenor of the will, or any clause in it, that the Testator intentionally omitted to give a legacy or make a devise to his child or grandchild* (whose parent is dead) *the Court will not interfere.*" This doctrine is reiterated down to the latest decision.

II.

In this condition of the law it remains to find whether, from the tenor of this will (aside from the question of oral evidence of intentional omission), it may "fairly be presumed" that the Testatrix, in this case, intentionally omitted to give a legacy or to make a devise to the Appellants, her grandchildren.

1*st.* These grandchildren were *in esse* at the execution of the will and codicil, as was also their father, for whom provision is made. It is not, therefore, the case of grandchildren born after the making of the will and before the death of Testator, and so "forgotten" by her.

2*d.* The cases are clear that where the gift is to grandchildren, omitting their parent, the mere statement that the grandchildren are the children of the son or daugther omitted is conclusive that such son or daughter were not forgotten. (Wild *vs.* Brown, 2 Mass. R., 570. Church *vs.* Crocker, 3 Mass. 17. Wilder *vs.* Goss, 14 Mass. 347.) So here; the father is named and provided for by the will for life, to the exclusion of his *living* children.

3*d.* The studied and careful exclusion of these grandchildren, then alive, by the provision that the gift to the father should, upon his death, go over to charity, and this again repeated in the codicil executed the year following, would seem conclusive of the intent of the Testratrix. *She must have anticipated the very event which has happened,* viz. — that, in the course of nature, the appellants or some of them would survive their father; but, notwithstanding this, she bequeathes the remainder of the estate, given for life to their father, to charity. To use the language of Sedgwick, J., in Terry *vs.* Foster, 1 Mass. 146: — "He had not forgotten them (grandchildren), he makes complete disposition of his property. This shows he did not intend they should come in for their portion."

4*th.* This settled construction of the 21 sect., Rev. Stat., has great force added to it when the provisions of the 24th sect. of the same statute are examined. That 24th sect. (Rev. Stat., ch. 62; Gen. Stat., ch. 92, sect. 28) provides as follows: — "When a devise of real or personal estate is made to any child or other relation of the Testator, and the devisee shall die before the Testator, leaving issue who survive the Testator, such issue shall take the estate so devised in the same manner as the devisee would have done if he had survived the Testator, unless a different disposition thereof is made or required by the will."

This then is a provision which embraces the very case of a parent named and provided for in a will with children not named in it.

Now, by Appellants' construction of the 21st section, those grandchildren would, in the state of facts set forth in this 24th section (viz.: the death of their father before the Testator), be entitled to treat the estate as intestate. If, therefore, Appellants' construction of the 21st section be true, then this result follows, viz., that the 24th section repeals the 21st section

(which upon Appellant's theory makes the estate intestate) in all cases where the will shall give *absolutely* to the parent of the children a shilling. So that the law as to the rights of unnamed grandchildren would be made to stand thus: — If the father took under the will a shilling, then they are deemed not to have been forgotten although not named in the will, as by inheriting this shilling they are provided for by the will. If the father, though mentioned in the will, took nothing under the will (or a life-estate as in this case) then these grandchildren, in the eye of the law, are deemed to have been forgotten.

This shows the absurdity of Appellant's construction of the 21st section, whereas the true construction, which accords with the judicial decisions, viz.: that the mention of children in a will by a father shows, *at least as to grandchildren in esse*, that those grandchildren were not forgotten, is in perfect harmony with the 24th section. The purpose of the 24th section being to relieve grandchildren thus placed, who would otherwise take nothing by declaring that any legacy or bequest to the parent should not lapse by his death but descend to them. In all other circumstances it left the effect upon grandchildren of the mention of their parent in the will, unchanged.

III.

The attempted answer of Appellants to this course of judicial decisions upon the Statute is, that an intention to omit these grandchildren, in order to be legally effective, must be shown to have existed after the death of their father,—because it was only upon the happening of that event in the lifetime of Testatrix that they become heirs apparent of the Testatrix.

This proposition assumes that it is not possible by even express terms to manifest in a will an intention to exclude persons who may in future contingencies fill the relation of heirs of a Testator. For if it be possible to manifest such intention in terms, then it is possible to do so by clear and just implication, and we thus come back to the question of what upon the authorities is to be deemed such just implication. Now this very point has been settled by a recent decision, that a Testator may by will exclude parties who in future contingencies will become his heirs (Prentiss *vs.* Prentiss, 11 Allen, 47). The will

excluded after-born children, and the plaintiff was subsequently born in the lifetime of his father, the testator. The Court say "The sole enquiry is whether it is sufficiently made to appear that such omission was intended and not occasioned by accident or mistake; all that is necessary to be shown is that the matter was in the mind of Testator, and by him deliberately acted on," and they refer to the case of Wild *vs.* Brewer, above cited (which declares that mention of grandchildren shows that the father was not forgotten), as decisive of the principle which is to govern in the case of the implied exclusion of parties who, by subsequent events, become heirs to a Testator.

This case, therefore, puts an end to the theory that if after making a will issue not mentioned in it become heirs apparent, although the Testator has, as is shown by his will, designed to exclude such issue, yet he cannot so do without making a new will and again expressing his intention. In the case cited the new issue and heir came into being in the lifetime of Testator and yet was excluded.

The Appellants' theory being thus unsound, the question again recurs, whether, having regard to the judicial decisions of Massachusetts, a will and a subsequent codicil giving to a son an estate for life, *excluding his then living children* from taking the remainder but devising it over to charities, presents, as to such children, a case in which, because their father died before Testator, to use the language of the Court in Goss *vs.* Wilder, "it is highly reasonable to believe that the Testator but for forgetfulness" would have given them the inheritance, or a case of intended exclusion — and it is submitted that it leaves nothing for doubt.

Some reliance is placed on a *dictum* of Shaw, C. J., in Bancroft *vs.* Ives (3 Gray, 367–370), that the "time to which the *question of omission* applies is the time of Testator's decease." This was said in a case where the sole question was, Whether children born after the making of a will should inherit, there being children alive when the will was made? and it was in answer to the argument that intention to omit should be construed to apply only to children in existence. Doubtless it is true that *actual omission* is only determined by the state of things at Testator's death, but the *intention to omit*, as to parties alive, may be expressed by a will whensoever made.

If it were necessary we should confidently submit, that, even if there were not on the face of a will a clear purpose by a devise over to disinherit grandchildren, as in this case, yet, at least, as to grandchildren alive at the date of such will, the mere naming of their father, then *in esse*, would be conclusive that they were not forgotten under the Massachusetts decisions.

IV.

The oral evidence of the actual intent of Testratrix that these grandchildren should in no event share in her estate is discussed fully in the opening brief; and if the fact that they were not forgotten (which disposes of the case) were not, as it is, clear on the face of the will within the Massachusetts cases, then the oral evidence (which by those decisions is admissible where the will furnishes no evidence) would be decisive.

But Appellants object that the oral evidence, to be admissible, must be confined to declarations of Testatrix after they become, by the death of their father, her heirs apparent; that the intention of Testatrix must be shown as it existed after this change of condition, and that this subsequent intention can only be shown by a new will and not by oral declarations. The error of this position is, that it assumes that the Testratrix could not by law, at the time she made her will, have foreseen this most natural and probable event, and have intended to provide for it by omitting these grandchildren and giving her estate to charities, and that, having this intention, as she may not have explained in her will the purpose of omitting them, her declarations of its being intentional is inadmissible. It proceeds on the ground that Testatrix could by law have no such intent until after the event happened which made the grandchildren heirs apparent, for if she could, then her oral declarations of such intention are clearly admissible within the settled rule.

In view of the case of Prentiss *vs.* Prentiss (*ub sup*), it is unnecessary to again discuss the question whether Testator might not by law foresee and provide for the exclusion of future heirs, and, if this be lawful, then her oral declarations of intent to do so are as admissible as they would be in any case where the omission in a will to provide for an heir is, by the settled

rule, open to explanation by such testimony. The principle, as stated in that case, shows that the intent to exclude future heirs needs no express provision in a will.

It is said by Appellants that the oral testimony, if not confined to declarations after the death of the father, must be restricted to declarations of intention existing when the will was made. This is hardly accurate, since testimony of declared intention before the will was made, as well as after, is clearly admissible. (Bancroft *vs.* Ives, *ub sup;* Converse *vs.* Wales, *ub sup.*)

V.

There is one other and separate ground on which the Appellants ask the Court to defeat these great public charities and give to them, as heirs-at-law of their father and aunt, *the whole estate.* It is this:—

The residue of the estate of Testator, after certain legacies, is devised in trust to Marsh, one of the Appellees, and to one Guild (who died before Testatrix)—"*and the survivor of them, their heirs,*" &c., to distribute the income among the three children of Testatrix during their lives, and at the death of the last survivor "*the principal or trust-fund to be disposed of for the benefit of the poor in the manner hereinafter provided.* It is my will that when, upon the decease of all my children, the trust-fund is to be disposed of as aforesaid, the said Marsh and Guild, *or their successors as Trustees,* shall select or appoint three or more gentlemen, who shall determine how, by the payment to permanently established and incorporated charitable institutions, my will to benefit the poor will be best carried into effect, and my gift be made most productive of benefit to the poor. And thereupon said trust-fund * * * * shall be disposed of and paid over in accordance with the determination of those gentlemen, certified by them in writing, to the Trustees." Power is given to Marsh and Guild, and *their successors as* Trustees, to sell and convey all real estate "according to their *joint and sole* discretion." Upon this it is contended that the power to select and inform "three or more gentlemen" was *joint and personal* to both Marsh and Guild, and was a *naked power,* incapable of being executed by Marsh, the survivor; and

so, as there is no legally expressed will of the Testatrix in behalf of the institutions Respondents, and as by Guild's death there can be none, the gift fails and the property reverts to the heirs-at-law. To this we reply,—

1*st*. If this were a case of a naked power (which it is not), and if the object of this gift were not (as it is) a public charity, but the property had been directed to be distributed among individuals, to be selected from the public at large in the mode provided by the will, yet the power might be well executed by the surviving Trustee, since the gift in trust is to "Marsh and Guild, and the survivor of them." And although this phraseology is not repeated in the clause as to the selection "of three or more gentlemen," yet such is the neccessary legal implication. Again, the terms are, "said Marsh and Guild, or their successors as Trustees, shall select," and this settles conclusively that it is not a "personal trust" in the parties named, but a trust *virtute officii* (2 Story, Eq., sec. 1062), and then, by the terms of the trust and by law, the power remains to the survivor.

Again (aside from the fact that this is a gift to charity), if its purpose was to benefit individuals, and if there were no words of survivorship, and the power was joint and personal to Marsh and Guild, it is submitted that it *is a power in nature of a trust*, and the Court would require its execution by the survivor. (2d Sugden Powers, 3d Am. Ed., 158 (143.) Fontain *vs.* Ravenel, 17 How'd, 369, 386.) But here the Trustees were seized and possessed of the property, and the power to be exercised was not a naked one, but incident to and coupled with the disposition by them of their title in the trust property, — it was a power coupled with an interest and that disposes of the question (Peter *vs.* Beverly, 10 Peter's R., 532).

It is said by ~~Libellants~~ Appellants, that the power in question was not to dispose of property, but to select others according to whose direction the property was to be disposed of, and that such a power cannot be one coupled with an interest, but must be a mere naked power. If the title had not been vested in these Trustees, but had remained in the heirs-at-law, perhaps the Appellants' position would be true. But the fact that it was thus vested, brings the case directly within the definition of a power coupled with an interest, and it is none the less so by reason of the fact that the power coupled with this interest is

to select others to designate the object, as well as to convey the estate to the objects thus designated.

2*d*. But if this were otherwise, yet this is a gift to charity, which is never allowed to fail. "Where there is a general intention shown by the donor to give to charity, the failure of the particular mode in which the charity is to be effectuated will not destroy the charity. The law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished. *This principle of construction, it will be observed, differs entirely from that applicable to a bequest to individuals, when on failure of the mode the gift fails altogether.*" (Tudor on Charities, p. 212.)

Again: "The same will follow when a testator, after making a bequest to such charitable uses as his executor shall appoint, revokes the appointment of the executor, or the executor himself renounces probate, or when the Testator, after making a bequest to said charitable uses as A shall appoint, A *dies in the lifetime of the Testator* or neglects or refuses to make an appointment." (Tudor on Charities, 216.)

The above are the settled doctrines of Courts of Equity in England, in carrying into effect the Statute of Elizabeth. This Statute *is fully administered* as part of the Common Law of Massachusetts (see cases collected on Mr. Loring's Brief, p. 4), and it has been recently decided by its highest tribunal, that where the charitable gift is devised to trustees, the Court will not allow it to fail, but apply, if necessary, the *cy pres* doctrine. (Jackson, Ex's, *vs.* Phillips, *et al.*, Jan., 1867, not yet reported, but copy of the manuscript herewith handed to the Court.)

S. BARTLETT, *for Appellees.*

12 Rule 1 & 4 5 Not entitled to
[illegible] discharge under the
[illegible] Statutes

Supreme Court of the United States.

December Term, 1867.

ABBY R. LORING & AL. (Infants),

BY THEIR MOTHER AND NEXT FRIEND,

vs.

LEVI H. MARSH & AL.

BRIEF OF APPELLANTS.

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1867.

Supreme Court, United States.

December Term, 1867.

ABBY R. LORING & AL. (INFANTS),

BY THEIR MOTHER AND NEXT FRIEND,

vs.

LEVI H. MARSH & AL.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This is a Bill in Equity brought by the complainants, in their capacities of heirs at law and next of kin to Abigail Loring, deceased, against Levi H. Marsh, as executor of the will of Abigail Loring, and against certain corporations which are said to have been enabled by said Marsh to claim under that will.

It is admitted, (p. 15) that the complainants are heirs at law and next of kin as stated in the bill. They are the children of the only son of Mrs. Loring, who died during the lifetime of his mother.

Mrs. Loring's will bears date October 19, 1858. At that date her son was living, and a provision is made for him by the will; two daughters were also then living, and a provision is made for each of them by the will.

On the 14th day of July, 1859, one of the daughters of Mrs. Loring having died, she made a codicil to her will, and directed what was given by the will to her deceased daughter, to be divided equally between her son and the surviving daughter.

Mrs. Loring's only son died April 6, 1862, leaving the complainants his sole heirs at law; and Mrs. Loring herself died November 8, 1862, without making any codicil to her will, after the decease of her son, and consequently, without naming the complainants, her grandchildren, in the will, or in any codicil; and as the provision made by the will and codicil for their father was limited to his life, and lapsed by his death in the lifetime of his mother, Mrs. Loring omitted to provide for the issue of her deceased son; and the first question is, whether they are not entitled to the same share of her estate as they would have been, had Mrs. Loring died intestate, by force of ch. 92, sec. 25, Gen. Statutes of Mass.

I. The *time* to which the question of omission applies is the time of Mrs. Loring's decease. Not having then made any provision by her will, or any codicil for the issue of her deceased son, the case of the statute arises. She had made a will and left issue of a deceased child without having made any provision for them.

Bancroft *vs.* Ives, 3 Gray, 367.

This is the case of a son, born after the making of the will. It cannot be distinguished from the case of grandchildren, who became the issue of a deceased son, and so within the statute, by the death of their father after the making of the will.

II. It does not appear that such omission *was* intentional, and *was not* occasioned by accident or mistake.

(1) The evidence of intention to *disinherit an heir* should be such as to leave no reasonable doubt of the existence of a

formed and settled intention. The common law always favors the heir, and one of its rules is that an heir cannot be disinherited, *even by a will*, unless there are *express* words or a *necessary* implication to that effect.

5 Cruise's Dig. 136, (Marg. pg.)

A fortiori where the disherison is to be effected by parol evidence of mere declarations of the testator.

(2) It is the office of such evidence to supply the omission of *a clause in the will* declaring the intention of the testator to disinherit the heir.

Wilson *vs.* Fosket, 6 Met. 400.

It is like the proof of the contents of a lost will by parol evidence, and the courts have held that this requires "*the clearest and most stringent evidence.*"

Davis *vs.* Sigourney, 8 Met. 487.

If what was actually written, in a duly executed will, cannot be proved to disinherit the heir but by "*the clearest and most stringent evidence,*" *a fortiori*, the heir cannot be disinherited by an intention never written at all, unless such intention shall be made out by "the clearest and most stringent evidence."

III. The true inquiry is this:

Does it appear, by the clearest and most stringent evidence, that the testatrix had a formed and settled intention to disinherit the children OF HER DECEASED SON; *and that by reason of such intention they were not named in her will or its codicil?*

(1.) The testimony of *Eliza A. Pratt* is wholly insufficient to make a case for respondents.

The situation of the witness at the time she testified, and the manner in which she was approached and led by Marsh,—

The false account she gives of her relation to Mrs. Loring,—

The great improbability that a reserved and dignified lady would make this young servant girl the confidant of her settled intentions respecting her only grandchildren, which she imparted to no one else,—

The bald and loose statements she makes, not attempting to give any part of the conversation, save certain words, the purport of which had been put into her mouth by Marsh's letter, nor to describe the occasion on which, or the connection in which they were uttered,—

The lapse of time since the words are alleged to have been spoken, and the absence of any motive to remember them, or any pretence that her recollection had been recalled to the subject, save by Marsh's letter (written five years after the supposed declarations), telling her what he wanted her to swear to—

The infirmity and treachery of the human memory, even under favorable circumstances, as to mere casual declarations, which so many rules of law are framed to guard against, and judicial experience recognizes,—

All combine not only to deprive the testimony of this witness of the character of "the clearest and most stringent evidence," but to place it below the level of ordinary credibility.

As to what she says (23d answer), she "*judged*" concerning Mrs. Loring's dislike of the *family* of her son's wife, and that Mrs. Loring's "feelings continued," it is wholly inadmissible. But whether so, or not, it is not material; for she does not venture to say that *the wife herself* was included in her dislike; and surely these innocent grandchildren of hers were not objects of her dislike. Mr. Thompson, the only member of the family who has been examined, says, Mrs. Loring appeared to be very fond of the eldest at the time of her birth, and he never heard her express any dislike to them.

(2.) She does not pretend she heard any declaration whatever from Mrs. Loring as to her grandchildren, *after the death*

of her son; and it was only after that event that *a case under the statute could exist.* The declarations, if believed, and if sufficient to show a formed and settled intention not to provide for the children of a *living* son, who is provided for by the will, do not prove, by any implication even, an intention to omit "the issue of a *deceased* son."

The statute recognizes *a new duty,* as incumbent *on the testatrix after the decease of her son,* to make some provision for his children, or manifest her intention not to do so. It is an intention not to provide for the issue of a *deceased child* which is to be manifested. The fact that she manifested an intention before this new duty was incumbent on her, not to provide for the *issue of a living son,* does not touch the case.

The remaining evidence is very slight.

Matilda R. Burton, formerly employed in the family as a seamstress, says, about four weeks before her death Mrs. Loring said "in conversation, that they had got enough, and Dr. Renton had all he would ever get."

"In conversation." What was the conversation? Most material, it may be, to know. That Doctor Renton had all he would ever get, may be admitted to be true; for it does not appear he ever had anything from her or any of the family. His only connection with the property of any of the family appears to have been as guardian of these children, after their father's death, and administrator of Miss Abby M. Loring, after her mother's death. The statement does not appear to have any connection with anything whatever.

"They had got enough." From this bald, disjointed and equivocal expression, made to a former servant, without knowing what preceded, or followed it, or under what circumstances it was made, the court is asked to *imply* a formed and settled intention to disinherit her only grandchildren, the children of her deceased son. Is that a *necessary* implication? If not, it is not sufficient to disinherit these heirs at law.

The attempt to show by the deposition of the defendant, Marsh, that a difficulty existed in the family, wholly fails.

No member or connection of the family, no person standing in such a relation to the testatrix as to be likely to be the depositary of her serious and settled intentions respecting her only grandchildren, has been produced by the respondents. Her son-in-law had no knowledge of an intention to disinherit them.

IV. The testatrix executed a will and a codicil before the decease of her son. These were ambulatory, and whether she intentionally omitted the complainants from them is not material, as no case under the statute then existed. And an intention to disinherit either children born after the making of a will, or the issue of a child dying after the making of a will, cannot be proved by parol. It can be manifested only by making another will or codicil, *from which* the person is intentionally omitted. Tucker *vs.* Boston 18 Pick. 162.

The other branch of this case depends on other facts and principles.

By her will, Mrs. Loring devised the residue of her estate to Levi H. Marsh, one of the defendants, and Samuel E. Guild (who died in the lifetime of the testatrix), in trust to pay one-third of the income of the property to each of her children during his or her life; and, upon the decease of the last surviving child, the trust fund was to "be disposed of for the benefit of the poor in the manner hereinafter provided."

"It is my will that when, upon the decease of all my children, the trust fund is to be disposed of aforesaid, —*the said Marsh and Guild*, or their successors as trustees, shall select and appoint three or more gentlemen, *who shall be informed of the facts by the trustees*, and shall determine how, by the payment to permanently established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect, and my gift may be made most productive of benefit to the poor; and that there-

upon the said trust fund (including the said shares of income retained) shall be disposed of, and paid over in accordance with the determination of the said gentlemen, certified in writing to the trustees."

I. Marsh alone could not execute this power to appoint the persons who were to designate the institutions which were to receive the property, and inform them of the facts needful to guide or influence their judgment in the selection.

(1.) This was not a power to appoint or select the donees of the property, nor to appoint the uses of the property. It was not a power over property. It was a naked authority, to nominate and appoint *persons*, who were to act for the testatrix in choosing the objects of her bounty, and to make known to them such facts as the two trustees should judge to be proper to guide or influence their judgment in the selection.

It was a power to appoint *persons*, and not a power to appoint *property;* and from the nature of the case must be a mere naked power, in contradistinction to a power coupled with an interest. A power coupled with an interest, means coupled with *an interest in the property which is the subject of the power.* Hunt *vs.* Rousmanier, 8 Whea. 174; and where, as in this case, property is not the subject of the power, the power cannot be coupled with an interest.

(2.) A naked power to two persons by name, cannot be executed by one.

Peter *vs.* Beverly, 10 Pet. 564.
1 Sug. on Powers, 144 Marg., pg.
2 Story Eq., sec. 1062 and cases cited.

II. The intention of the testatrix to give this property to charitable institutions, was never perfected. She intended to speak only through persons selected and informed by both Marsh & Guild. There being no such persons, there is no

expressed will of the testatrix in behalf of the institutions who are respondents.

Fontain *vs.* Ravenal, 17 How. 369.

III. The power exercised by the Lord High Chancellor in England to make a will for a testator, simply because his will manifests some intention to make charitable bequests is not a *judicial* power, and does not exist in any Court of Massachusetts.

Rumany *vs.* Butcher, 1 Tur. and Russ. 260.
Wheeler *vs.* Smith, 9 How. 55, 17 How. 386.
Constitution of Mass. Art. 1, Sec. 30.
Fontain *vs.* Ravenal.

IV. There being no mode, consistent with the will of the testatrix, of ascertaining the objects of her bounty, there is a resulting trust in favor of the complainants who are her heirs at law.

B. R. CURTIS,
C. CUSHING,
HUTCHINS & WHEELER,
Of Counsel with the Complainants.

Supreme Court of the United States.

No. 198.

ABBY R. LORING & ALS.

vs.

L. H. MARSH & AL.

BRIEF FOR L. H. MARSH,

Trustee and Executor on the Complainants' Claim, by reason of their being omitted in the Will.

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1867.

United States Supreme Judicial Court.

DECEMBER TERM, 1866.

ABBY R. LORING ET ALS. *vs.* L. H. MARSH ET ALS.

BRIEF FOR L. H. MARSH, ON THE COMPLAINANTS' CLAIM BY REASON OF THEIR BEING OMITTED IN THE WILL.

Statement of Case.

Mrs. Loring's will was made October 19, 1858. She had then living a son, Josiah Q. Loring, the father of the complainants, and two daughters, who had no children; one was Cornelia W. Thompson, wife of S. Benton Thompson; the other was Abby M. Loring, who was unmarried.

Her will is drawn carefully, and at great length. She gives legacies, varying in amount from one thousand to one hundred dollars, to no less than sixteen persons by name, and also to the children of two of these persons. Her legatees she describes as living in Boston, Springfield, Cohasset, Cambridge, Chelsea, Yarmouthport and Dedham, in Mass.; in Hartford, New York, Washington, St. Louis, Staunton, Va., Nashua, N. H., and Malaga. To some she gives the legacies outright; to one, to dispose of as he thinks best, probably, some charitable trust; to another, if he shall reply he wants the sum. To one, a widow, the income during her life; and, upon her decease, the principal to her grandchildren; and to relieve the executor from the care of it, she provides that it may be deposited in The Massachusetts Hos. Life Ins. Co., the great trust company of Boston.

Some small legacies are then given to charitable institutions. Then the rest of her property is devised to two trustees in trust to hold, invest and manage the same, and to pay over the income during life to each of her three children, naming them separately. She further provides that upon the decease of each of her children, his or her share of the income should be retained and invested until her last surviving child died, and then the income accumulated with the principal should be dis-

posed of for the benefit of the poor. She states how this shall be done, directing it to be by payments to permanently established and incorporated charitable institutions, and she directs the way in which her object shall be carried out, showing great wisdom in the manner pointed out. (See Will, p. 4.)

July 14, 1859, Mrs. Thompson having died, Mrs. Loring by a codicil leaves the income of one half of her estate to her daughter Abby, and one-half to her son Josiah during life only, instead of one-third as before. She says she revokes her will as to her income only, but ratifies and confirms everything else.

Josiah Q. Loring died April 6, 1862, leaving a widow, Christian W. R. Loring, formerly Renton, and three children surviving. Mrs. Loring died seven months afterwards, November 8, 1862. Her daughter, Abby, died on 22d June, 1863, unmarried, intestate, leaving the children of Josiah as her heirs at law. The children of Josiah, at Mrs. Loring's death were Abby R., Marion W. and Elijah James; they were all living at the time Mrs. Loring made her will and codicil. They are the complainants and claim one-half the estate of Mrs. Loring under § 25 of Chap. 92 of Gen. Stat. of Massachusetts, on the ground that the omission of Mrs. Loring to provide for them was unintentional and occasioned by accident or mistake.

By Gen. Stat. Chap. 92, § 1 *et seq.* every one has the absolute disposal, by will, of his whole estate, excepting the right that a wife or husband has in the other's estates. A parent has the right to leave his child no part of his estate. This has always been the law.

The first statute giving any share of the estate to a child, not mentioned in a will, is the provincial statute 12 W. 3 c. 7 (passed in the year 1700), (see 3 Mass. 20). The statute had this preamble: "Whereas, through the anguish of the deceased testator, or through his solicitous intention, though in health, or through the oversight of the scribe, some of the testator's children are omitted, and not mentioned in the will; many children also being born after the making of the will, though in the lifetime of their parents;" it was enacted that a child not having a legacy given him in the will, every such child should have a proportion of the estate. Doubts having arisen as to whether grandchildren came under the provisions of the statute, in 1718 they were included by the Legislature.

The Statute of 1783, Chap. 24, § 8, had the same enactment, giving a proportion to children omitted, but without the proviso.

When, however, cases arose under the statute, the Court held, that where a child had no legacy, but was mentioned in the will, so that it appeared the omission to provide for him was intentional, and not by accident or mistake, that he had no portion under the statute. This statute of 1783 was considered a mere revision of the statute of 12 W. 3. And the statute was still held to be for the purpose of rectifying an accidental omission; or what may be called an unintentional one, where children were born afterwards, whom the parent had not in contemplation when the will was made.

The next statute as to this matter, passed in Massachusetts, was the Rev. Stat. 1836, Chap. 62, § 21. The same statute is re-enacted by Gen. Stat. 1860, Chap. 92, before referred to.

The Gen. Stat. and Rev. Stat. have in addition to the provision of the Statute of 1783, the provision that a child not provided for, shall not have a portion of his parent's estate, when he has been provided for in his lifetime, or the omission was intentional and not by mistake or accident.

The Supreme Court of Massachusetts say (in Bancroft *vs.* Ives, 3 Gray, 368, 369), that it was not the intent to alter the law of 1783 in this respect, but only to affirm and give the authority of positive law to the construction which had been put upon it in several cases.

It will thus be seen that the law has always been the same, and that the numerous decisions arising under the different statutes, are of authority in this case. The law as it now stands, is thus:

The General Statutes first give, in Chap. 92, § 1 *et seq.* the right to a person to dispose of his property by will absolutely; to leave his children or grandchildren nothing, if he sees fit.

§ 25. Where he has omitted to provide for a child, or issue of a child, "by accident or mistake," and not intentionally, they are entitled to their proportion as if he had died intestate.

§ 26 provides for posthumous children *not provided for.*

§ 28 provides for a case like the present; that where a child dies

after the will is made, and before the testator, his issue shall take his devise.

It will be noticed that in all cases, even in that of posthumous children, the provision of the statute only applies to children not provided for, those overlooked unintentionally, or by accident or mistake.

It is not any right that the Legislature gives to a child in his parent's estate, but when overlooked by accident, or omitted by mistake of the scrivener, it is intended that he shall have what his parent probably would have given him, if he had not overlooked or omitted him.

The right is one wholly derived from the statute, and where the testator has a power of appointment to dispose of an inheritance and does not provide for a child, the child has no claim, the statute only applies to the testator's own estate.

1 Story 426, Blagge *vs.* Miles.

I.

These grandchildren who were living when the will was made, do not come under the head of posthumous children, or after-born children, who were not known and have not been considered in a will; they are the issue of a child living when the will was made. They are provided for under § 28; they take the devise to their parent whether it is personal or real estate.

It is to be observed that the devise to the deceased child, which would have lapsed before this provision, (see Paine *vs.* Prentiss, 5 Met. 396,) does not become part of his estate to be administered upon, to go to the husband if the estate were personal and the child were a married woman, or if real, to her heirs, but the issue of the deceased child, the grandchildren, take the whole of it, whether personal or real.

The issue being provided for in this manner, cannot also come under the provisions of § 25.

This succeeding section controls the provisions of § 25, as the issue of a deceased child cannot both take the devise to its parent and a full proportion of the estate; it must be one or the other, as both could not be intended and may be impossible. If, in this case, Josiah Q. Loring, had a devise of one-half in fee, and not for life, of his mother's

estate, and Miss Abby M. had the other half of the estate — by this § 28 — Josiah's children take that one-half. And on the ground contended for by complainants, that by the death of their father they are on the same footing as posthumous or after-born children not mentioned — they also take one-half of the estate by reason of their now first coming into the relation of immediate descendants. Thus taking, in fact, both halves and leaving Miss Abby M. Loring nothing. This is too monstrous a result to be sanctioned. It is evident that this § 28, which provides for all cases where a child dies, after a devise to him, leaving issue, takes all such instances out of the class of cases provided for in § 25: for cases like this cannot come under that section; it is impossible for grandchildren to take as issue the legacy of their father or mother, and also a share as if they were posthumous, or after-born, or unintentionally omitted children.

If it be contended that there is no provision, because the legacy here to the complainant's father was a life estate; and, therefore, the grandchildren take nothing. The answer is that the law is intended for cases only of accidental omission of a parent and his issue. If the legacy to the parent had been half of the estate, these children, complainants, would take that under § 28; and it has been shown could not also take under § 25; if the legacy were a quarter of the estate, or even one dollar, they would take that only. If the parent's legacy is a life estate, instead of a nominal legacy, his children living at the time, it can make no difference; he and his issue are as evidently in mind in the case of the life estate as if there had been a nominal legacy to the parent. If the parent had survived, the children would have had, indirectly, by inheritance, the benefit of the large life estate; their branch of the family has been in mind.

It cannot, with any show of reason, be urged that the issue of testator's son becoming heirs by his death, can only be deprived of a share of an estate by a will made after the period of the son's death. This would do away with this § 28, in every case, and would render it in many cases impossible for a testator to make a valid will. The policy of the whole law is different; the statute even in a case of a posthumous child only provides for one *who has no provision made for him by his father*. And in Bancroft *vs.* Ives, 3 Gray, 371, the Court in case of

after-born children, give them a share, not because the will was made before they were born, but because they had no legacy in the will, while those living when the testator made his will did have legacies, and his intent by his will appeared to be to give all his children legacies. The statute and the decided cases, and the universal practice in making wills to provide for the contingencies of after-born children, conclusively prove that the rights of after-born and posthumous children, and the issue of a son dying after the will was made, can be regulated or taken away without the making of a new will after the birth of the child or the death of the son.

II.

This is a case arising under the statute of Wills of Massachusetts, and is a question of local law; in such questions the United States Courts adopt the construction of the State tribunals.

The law has been, in many cases, clearly settled in Massachusetts.

The Courts are emphatic and clear in stating that the only question under the statutes is, whether the testator has overlooked his issue intentionally or by accident or mistake. There is no right of the children in the matter.

The question has been in all the cases, does it appear from the tenor of the will, and the circumstance of the case, that the testator made an unintentional or accidental omission, or one through mistake of the scribe, or do the circumstance of the case and the will, show that the parties omitted were in the mind of the testator, and were left out intentionally?

The mention of the father in the testatrix's will and codicil, the devise to him for life, the careful disposal of the principal afterwards to others, and the other provisions of the will, are conclusive that the issue of the father mentioned were in the mind of the testatrix, and that the omission was intentional and not by accident or mistake, and that the testatrix intended her fortune for the poor, and not for them.

The authorities are conclusive on this point. 3 Mass. 17, Church *vs.* Crocker. The law at this time gave a share to a child who had no

legacy, but the Court held a devise by the testatrix to the children of her son Edward, proved that the parent was in the contemplation of the testatrix, and that therefore the son Edward could not claim a distributive share. See Parsons, J., Opinion.

So, 2 Mass. 570, Weld *vs.* Brown, devise to grandchildren of daughter Sarah, was sufficient to show Sarah was in mind.

1 Mass. 146, Terry *vs.* Foster. There was no legacy here, but the Court held, because the will appeared to have been made with great deliberation, the testator having disposed of all his property, and the grandchildren who claimed being mentioned, they could not take a distributive share. The Court came to their decision from the tenor of the will solely.

And in 14 Mass. 357, Wilder *vs.* Goss, the mention of a son-in-law and a legacy to one grandchild, was held as raising an inference that the other grandchildren, not mentioned in the will, were not forgotten.

The Court say, p. 359, that "the Legislature wisely intended" to bestow upon a child or grandchild, omitted through forgetfulness or mistake, "what it was highly reasonable to believe the testator, but for such forgetfulness or mistake, would himself have done. To go further than this would be in its measure to defeat the principal intention of the Legislature in the first section of the statutes, which authorizes every person seized of an estate in lands, which may extend beyond his own life, to devise the same as he shall think fit. Whenever, then, it may be fairly *presumed from the tenor of the will, or of any clause in it,* that the testator intentionally omits to give a legacy, or to make a devise to his child or grandchild whose parent is dead, the Court will not interfere."

In all these cases it is held that a legacy to children proved the family was in mind, and the father could not therefore make any claim; and yet the obligation to provide for a child is stronger than that to provide for grandchildren.

If the legacy had been one cent to the father, his issue would have taken it, by statute, and the omission to notice the grandchildren would be held to be intentional. It makes no difference, in fact, as far as the grandchildren are concerned, whether the legacy to their father is this nominal one, or a devise for life.

By a devise for life to the father it is shown that he, and consequently his family, were in the testatrix's mind. By limiting the devise to the

life of the father, and then giving the estate on his death to other persons in trust for the poor, the testatrix as expressly says that she does not mean the grandchildren to be benefited by her estate, as if she in words had declared it.

The whole question is whether from the tenor of the will the inference is to be drawn that the omission was intentional, and not occasioned by accident or mistake.

Here, first, in a full and carefully drawn will, after many legacies and a devise of income to a stranger for life and principal to grandchildren afterwards, is a provision that the income of the rest of her property shall be paid to her three children, and upon the death of a child, that his or her share of the income shall accumulate, until the death of the survivor, and shall then with the principal be distributed for the benefit of the poor as provided in the will. It is the same as if she had said expressly the issue of his children should not take upon the death of their father. She could not, *nor could the person who drew the will*, have overlooked them by accident or mistake; they were then all living.

In a codicil made nearly a year afterwards, one child having died, she again divides the income during the life of her children and the survivor of them, giving them each one-half, but confirms and ratifies her will as to the disposition of the principal. Here again the whole matter must have come before her mind, and been reviewed; there was an important change as to what she gave her children, and no omission as to either of them; and it is evidently impossible that the omission of the grandchildren was by "accident or mistake." On the contrary, it must have been intentional.

It was emphatically her intention that all her property after the death of her children, should go for the benefit of the poor. The case presented is not that of one descendant accidentally omitted and others having a devise; but a laudable and praiseworthy disposition of a charitable lady who wished to benefit the poor by all her property, and not grandchildren who had, in her opinion, enough.

In Wilson *vs.* Fosket, 6 Met. 403, the Court also says the construction under the old law has been "that whenever from the tenor of the will, or from any part of it, sufficient appeared to indicate that the testator had not forgotten his children or grandchildren (as the case might be) when he made his will, they would not be entitled to a distributive share of

his estate, although no legacy was given them by the will." This principle, already adopted by the Court, was also adopted as a statute provision by adding the words now contained in the General Statutes, (p. 404).

In 4 Allen, 512, Converse *vs.* Wilson, evidence of wills previously made having the omission of the same grandchildren, was admitted to show intentional omission.

In the present case there was an omission in the will and subsequently in the codicil.

If this had been a case of grandchildren born after the will was made and whose father had died before the decease of testator, it would be a different matter. It would then somewhat resemble the case of after-born children, that of Ives *vs.* Bancroft.

Grandchildren would be in existence not contemplated at the time the will was made, and the omission might be said to be unintentional, as the testator did not anticipate any such issue. Here, however, is a case of a child with children living when the will is made, and the testator carefully limits the devise to a life estate to the father in so many terms. There is nothing in the death of the father which in the least adds to the call to the testator to make a different disposition of property for the grandchildren. If the father had survived a day, they could make no pretence under any statute, though she omitted any mention of them. It must be borne in mind that the statutes give *no right to the child or grandchild to the estate of the parent, but merely provide for an omission made unintentionally by accident or mistake.*

III.

If it appears by the will alone that the omission was unintentional and by accident or mistake, the contrary may be shown by parol evidence.

6 Metc. 400, Wilson *vs.* Fosket.
4 Allen, 512, Converse *vs.* Wilson.

In both of these cases, upon the wills alone, the omitted children and

grandchild would have taken. They were excluded by reason of the testimony produced *aliunde*. The parol evidence offered was declarations of the testator; and the Court in delivering the opinions treat the issue of intent of the testator, as if it were any other issue to be decided by the preponderance of the testimony. In fact, instead of requiring the clearest and most stringent evidence, as if it were to change the will, they treat evidence produced to show that a party is intentionally omitted, as in support of the provisions of the will.

In Wilson *vs.* Fosket, Dewey, J., says, page 405, "When offered, as in the present case, to establish the proposition that the grandchild was intentionally omitted in the will, and therefore he cannot be allowed to claim as heir at law, and thus disturb the provisions of the will, *the evidence is entirely confirmatory of the will*, and therefore is certainly not a violation of the rule, that parol testimony of the declarations of the testator cannot be given in evidence to overthrow or control the words of the will."

That the omission was intentional in this case is clearly proved by the most reliable testimony, and there is no contradictory evidence.

The deposition of Eliza A. Pratt is full, satisfactory and uncontradicted on the point in question.

She lived in the family over seven years. She was with Mrs. Loring "all the time, except when absent to meals, from the time she arose in the morning until she retired at night, except when doing a few chores" — answer to fourteenth interrogatory, p. 26. From her answer to the thirteenth interrogatory, p. 26, it appears that Mrs. Loring was not in the habit of seeing many visitors. With the exception of her daughter, and her lawyer, who drew the will, who are dead, no one would be so likely to know her intention as this constant companion of her old age.

In answer to the fifteenth interrogatory, p. 26, she says, "I have frequently heard her say, that Josiah's children should not derive any benefit from her estate after her decease. This I have often heard her say." And to sixteenth, seventeenth direct, and seventh cross answers, pp. 26, 28, she says it was expressed very often, and before and about the time the will was made frequently, and also at the time and after the codicil was made. To the eighteenth interrogatory, p. 26, she says, she never did express any change of her intentions on this subject.

And, in answer to nineteenth interrogatory, p. 26, she says, "a few

days before the codicil was made, and after Mr. Thompson's death, Mrs. Loring stated to her daughter, Miss Abby M. Loring, in my hearing, that Josiah Q. Loring should have the part of her property intended for him, during his lifetime, and that after his decease, it should go for the benefit of institutions, and that would prevent any of the Renton family from getting it, and Josiah's children." This is repeated in answer to the twentieth interrogatory, p. 27.

Nothing can be more explicit and direct than this. She also, in answer to the twenty-third interrogatory, p. 27, states fully and explicitly the reason of her leaving them nothing. "Mrs. Loring disliked the family of her son's wife, judging from her words and actions, and there was no intercourse between the families. I have heard her express the reasons of such dislike, she stating that they were a bad, wicked set, capable of doing anything, and having no principle, and that these feelings continued during her life."

She also states, to twenty-first interrogatory, p. 27, that the children were in her mind and knowledge; and to the twenty-second cross-interrogatory, p. 30, her mind was perfectly clear to the last hours of her life, took an interest in everything, and her judgment was as good as ever.

When cross-examined, in answer to the tenth cross-interrogatory, p. 29, she shows that she even remembers the other witnesses to both the will and the codicil.

Her whole employment, for seven years, being to attend on Mrs. Loring, she would know and would remember her sayings. Her deposition, too, is taken at a great distance, in another State, in Ohio, with no one to talk to or refresh her memory, and nothing except a letter, very properly written by Mr. Marsh, the executor, inquiring if she knew anything about the matter. (See answer to 2d Int. p. 23.)

Matilda R. Burton, who knew Mrs. Loring for thirty-four years, lived in her family ten years, and took care of her when sick, and who visited her very often, testifies to interrogatory 5, p. 24, that *after Josiah's death*, "about four weeks before she died, I called to see her, and in conversation, she said that they (Josiah's children) had got enough, and that Dr. Renton had all he would ever get." She had previously spoken of the trouble in the family. (Answer to 4th Int.)

It is fully, unequivocally testified that Mrs. Loring disliked her

daughter-in-law's family, that she would not see her grandchildren, and that there was trouble in the family; and that these were reasons why she intentionally omitted them.

The complainants, though taking testimony, and though Dr. Renton and Mrs. Josiah Q. Loring were living at the former trial, have not attempted to disprove these matters. If they were not so, it could easily be proved.

The plaintiffs do examine at length S. Benton Thompson, the son-in-law of Mrs. Loring, who says, in answer to seventeenth interrogatory, p. 19, that he never heard "one word" from Mrs. Loring as to the disposition of her property so far as these children were concerned. From his not being remembered even amongst those who received small legacies, it may be reasonably inferred that Mrs. Loring had no particular liking for him. Certainly she was exceedingly reserved in her communications with him. In answer to fourteenth interrogatory, p. 18, and first cross-interrogatory, p. 20, he does not pretend that she was fond of Josiah's children. He only can say at the time Abby Rand was born (she was eleven when Mrs. Loring died), she seemed to be very fond of her. He never saw the children visiting Mrs. Loring, but believed they did.

This is all the evidence the plaintiffs bring, and they thereby confess that they cannot contradict the strongest and most explicit testimony as to the dislike of Mrs. Loring to those grandchildren.

Their whole attempt to weaken Miss Pratt's testimony is on the ground that she said she was a companion to Mrs. Loring, and in the answer to the second cross-interrogatory, p. 28, that she testified she lived "as a servant, companion, confidant, or anything she chose to make me" of Miss Loring. This matter the complainants' counsel pursue, and Mr. S. Benton Thompson denies in interrogatories and answers running from eighteenth to twenty-second, inclusive; and it is the only very positive and emphatic testimony the gentleman has given.

It appears, however, that this young woman came into Mrs. Loring's family when she was sixteen, and that owing to some cause, either her confidential and intimate relations to Mrs. and Miss Loring, or her attainments, or some peculiar attachment of them to her, that Miss Loring's friends raised and presented to her the money to pay her expenses at the Oberlin College. This would not have been done, in

all probability, to a mere servant; it more than confirms her sta as to the relations she bore to Mrs. Loring. (See answer to 17th int., p. 30.)

As to any objections to Mr. Marsh's letter: it is precisely such a as an honest, upright man of business would write; he wished to if Miss Pratt knew anything in the case, and was, perhaps, a little nant that, after all, Dr. Renton and his family should have stepped Miss Loring's large property. No attorney would have taken her mony without finding out what she knew. If she had been here, co would have seen her and have gone over the whole case with he find out what she knew. As it was, they had to trust to interrogat and she has shown by her answers that her knowledge was intimate confidential. Taken as her testimony was, with only this single l of Marsh, inquiring of her, it particularly recommends itself to the sideration of the Court.

Mr. Marsh testifies that Mrs. Loring charged him to attend to ca ing out her wishes under the will (p. 20), thus showing her anxiet to benefit the poor.

Mr. Guild, the other trustee, is dead.

It is maintained, that in this case, from the tenor and the circumstances of the will and codicil alone, it is certain that there is no omission of the claimants unintentionally, accidentally, or through mistake. That if the tenor and circumstances of the will and codicil were otherwise, they would be controlled by the evidence, which alone is sufficient to establish the intention, not to devise a portion of the estate to the claimants; that both the tenor of the will and the testimony confirming each other, there can be no possible doubt in the matter.

For other points, see brief of counsel for the charitable institutions.

C. W. LORING,
for
L. H. MARSH,
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U. S. Circuit Court....First Circuit.

ABBY R. LORING *et al.*

IN EQUITY,

vs.

LEVI H. MARSH *et al.*

OPINION OF MR. JUSTICE CLIFFORD.

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HUTCHINS & WHEELER.

FOR RESPONDENTS.

SIDNEY BARTLETT,
F. C. LORING,
C. W. LORING.

ABBY R. LORING *et al.*

IN EQUITY,

VS.

LEVI H. MARSH *et al.*

THIS is a bill in equity, brought by the complainants to set aside certain provisions in the will of Abigail Loring, late of Boston, deceased, and to enforce their rights as heirs at law of her estate. Complainants are Abby R. Loring, Marion W. Loring and Elijah James Loring, children of Josiah Q. Loring, deceased, who was the son of the testatrix. Date of the will is the nineteenth day of October, 1858, and the pleadings show that at that time the testatrix had three children, to wit, Abby M. Loring, Cornelia W. Thompson, and Josiah Q. Loring who was the father of the Complainants. After sundry legacies, not material to be noticed, the testatrix devised "all the rest, residue and remainder of her estate and property, real and personal, unto Levi H. Marsh and Samuel E. Guild, to have and to hold the same to them, and the survivor of them, and their and his heirs and assigns forever to their own use, but in trust to, under and for the following uses, purposes, trusts and limitations, namely: to hold, manage, invest and reinvest the same according to their best discretion, and to pay over one-third of the net income therefrom," to each of her before mentioned three children, during their respective lives. Provision was also made in the will that "upon the decease of my said children, severally, the shares of said income, which they would continue to take, if living, shall be retained and invested by the trustees, until the decease of my last surviving child, and shall then with the principal, or trust fund, be disposed of for the benefit of the

poor, in the manner" therein provided. All of the complainants were born before the date of the will, and it will be observed that provision was made in the will for their father who was then in full life. Record shows that Cornelia W. Thompson, one of the daughters of the testatrix, died on the tenth day of June, 1859, without issue, and that on the fourteenth day of July following, the testatrix made a codicil to her will, giving the whole of the said income under the conditions and provisions contained in the will to her two surviving children, in equal shares during their joint lives, and one-half thereof to the survivor of them during his or her life. Father of the complainants, Josiah Q. Loring, died on the sixth day of April, 1862, and Samuel E. Guild, one of the trustees, died on the sixteenth day of July, in the same year. Testatrix died on the eighth day of November, 1862, leaving her will as originally executed except as modified by the codicil, to which reference has been made. Her remaining daughter, Abby M. Loring, died on the twenty-second day of June, 1863, unmarried and without issue, and Peter Renton, the other respondent, was duly appointed administrator of her estate.

Claim of the complainants is that they are entitled to one-half the property, real and personal, mentioned in the will of the testatrix, as heirs at law of her estate. They attempt to support their claim in that behalf, upon several grounds, which deserve to be carefully considered. First, they contend that being the issue of a deceased child of the testatrix, they take the same share of her estate that they would be entitled to if she had died intestate, because, as they insist, the testatrix, on the facts exhibited in the record, omitted to provide for them in her will within the meaning of the twenty-fifth Section of the State Statute of Wills. Secondly, they contend that the surviving trustee cannot lawfully execute the power directed by the will as the sole means of designating the objects of the testatrix's bounty, because it is not a power to select or appoint the donees of the property, but a mere naked authority to nominate, appoint, and instruct persons who were to act for her in that behalf, in making such selections. Thirdly, they submit that the conclusion of law, on the whole case, is that the intention of the testatrix to give the property to charitable institutions was never perfected, and consequently that they are entitled to their distributive shares in the same as heirs at law. Respondent, Marsh, denies those several propositions, and contends that the case does not come within the

provision of the Mass. Statute of Wills, mentioned in the first proposition of the complainants, and insists that the surviving trustee may execute the power to select and appoint the committee provided for in the will, and that the particular bequest in question is valid by the laws of the State.

I. Obviously the first question involved is the construction of the State Statute of Wills, and therefore is a question of local law. Universal rule is, in cases depending on the Statute of a State, and more especially in those respecting the titles to lands, the federal Courts adopt the construction of the State tribunals when that construction is settled or can be ascertained. Where the construction is settled by the State Court, the rule is that the federal Courts will follow that construction; but when the question has not been decided by the State Court, then the duty of ascertaining the true construction in the particular case is necessarily devolved upon the tribunal where the case is pending. Language of the provision under consideration is as follows: when a testator omits to provide in his will for any of his children or for the issue of a deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate, unless they shall have been provided for by the testator in his lifetime, or unless it appears that such omission was intentional and not occasioned by accident or mistake.—Mass. Gen. Stat. (1860), Chap. 92, Sec. 25, p. 478. Same provision and substantially in the same words is contained in the Statutes of the State, called the Revised Statutes, passed twenty-four years earlier. Indeed the substance of the provision as held by the Courts may be traced back to colonial times. Colonial Statute of 12 W. III, passed in the year 1700, provided in its second section that any child or children, not having a legacy given them in the will of their father or mother, shall have a proportion of the estate of their parents given and set out unto them as the law directs for the distribution of the estates of intestates, provided such child or children have not had an equal proportion of his estate bestowed on them by the father in his lifetime. Preamble of the section refers specially to the fact also that many children are born after the making of the will, showing conclusively that after born children, as well as those omitted in the will who were in being at its date, were intended to be included. Doubts, however, arose whether it included grand-children, but the legislature, on the eighteenth day of May,

1718, passed a resolve declaring the affirmative of the proposition, and such, ever after, was the received construction.—Ancient Charters, Chap. 7, Sec. 2, p. 351. Phraseology of the provision was somewhat changed in the act of the sixth of February, 1784, and the preamble was entirely left out. 1 Laws (Mass.) (1800) p. 111. By the eighth section of that act it is provided that any child or children, or their legal representatives, in case of their death, not having a legacy given him, her or them in the will of their father or mother, shall have a proportion of the estate of their parents assigned unto him, her or them, as though such parent had died intestate, provided such child, children or grand-children have not had an equal proportion of the deceased's estate bestowed on him, her or them in the deceased's lifetime. Earliest decision of the Courts of the State upon the subject, is that of Weld et ux. v. Brewer, decided in 1797, and reported in the supplement of 2 Mass. R., p. 571. Testator in that case devised the income and improvement of his real estate to his wife, during her natural life, and then directed that at her decease the same should be divided among his grand-children, describing them by their respective names, and as "children of my daughter Sarah," giving the estate to them "in equal parts or portions forever, for them to improve and dispose of as they may see fit," but he made no provision for his daughter, the mother of the devisees. She, with her husband, petitioned for partition of the estate, claiming a distributive share as heir at law, and the case was submitted to the Court, upon an agreed statement of facts. Held that she was not entitled to a portion of the estate as though the testator had died intestate. Next case is that of Terry v. Foster, 1 Mass. 146, decided in 1804, and is the first case upon the subject reported in the regular series of reports. Appellants in that case were the grandchildren of the testator, and the report of the case shows that their mother, the daughter of the testator, deceased before the date of the will. Material provision of the will was: I give to my daughter Mary Russell, five dollars, and to my daughter Bushop, five dollars; to my grand-children of my daughter Terry, deceased, to be paid to them when the youngest of them comes of age. Doubts were entertained by all the judges, whether any legacy was actually given to the appellants, but they all held that the Act of the sixth of February, 1784, did not repeal the Colonial Statute, and that any child or grand-child being noticed or mentioned in a will showed

that he was not forgotten, that the Statutes taken together as *in pari materia*, extended only to cases of entire omission, that it was not necessary that the child or grand-child should have a legacy to exclude them, but that it was sufficient if it appeared by the will that the testator had not overlooked the claimant. Three years later the case of Church v. Crocker, 3 Mass. 17, was presented for decision. Report of the case shows that the testatrix in that case gave one-fifth part of the residue of her estate to her six grand-children, *the children of her son Edward*, but no legacy was given to Edward himself. Argument for the plaintiff was that inasmuch as no legacy was given him in the will, he was undeniably entitled to a distributive share in the estate; but the Court held otherwise, after the fullest consideration. Public policy, say the Court, requires that the right of testamentary disposition in parents respecting their children, should be exercised at their discretion; and they held that the intention of the eighth section was, not to limit this discretion as distinctly conferred by the first section of the act, but to provide for a child or grand-child when this discretion from accident or some other cause had not been exercised. Conclusion was, that when a child is named in his parent's will, although he has no legacy given him, he is not entitled to a distributive share of the estate, because that fact shows that the child was in the mind of the testator at the time the will was prepared, and consequently that it cannot be held that he was omitted by accident or mistake. Last case under that statute is that of Wilder v. Goss, 14 Mass., 357, which has an important bearing upon the question under consideration. Statement of the case shows that the daughter of the testator died before the testator and before he made his will, leaving seven children who survived their grand-father. Wife of the appellant claimed a distributive share in the estate, as heir at law, because she had no legacy given her in the will, and was not named in the same. Name of the mother of the claimant was Rebecca Thurston. Among other things the testator stated in the will that having before that time conveyed to her son-in-law, John Thurston, the principal part of his real estate, he should make no further devise to him, but gave a legacy to Thomas Thurston, brother of the claimant, and then the residue of his estate to his other three daughters, who were living. Facts show that claimant was an heir at law to the estate of the testator when the will was made, and that she neither had any legacy given her nor was she

named in the will. But the Court held that the mention of her father by the testator as his son-in-law, and the giving of a legacy to her brother, must have brought the recollection of his deceased daughter to his mind, and showed that the family was in his remembrance, and consequently that she was not entitled to a proportion of the estate. Whenever it appears, say the Court, that the testator has, through forgetfulness or mistake, omitted to bestow any thing upon his child or grand-child, the legislature wisely intended to effect that which it was highly reasonable to believe the testator, but for such forgetfulness or mistake, would himself have done. But the Court insist that to go further than that would be to defeat the principal intention of the legislature in the first section of the act, which authorizes every person seized of an estate in lands which may extend beyond his own life, to devise the same as he shall see fit. Consequently whenever it may fairly be presumed from the tenor of the will or of any clause in it that the testator intentionally omits to give a legacy or to make a devise to his child or grand-child whose parent is dead, the Court will not interfere. Such were the views of the Supreme Court of the State, in the several cases which arose under the Statute of the sixth of February, 1784; but the Court went further in the case of Wilson v. Fosket, 6 Met. 400, which is a case that arose under the Revised Statutes of 1836, and held that it was not necessary that it should appear by the will itself that such omission was intentional, but that it may be shown by parol proof; and such, it is believed, is the settled doctrine of the State Court.

Referring to the prior decisions, the Court say the construction has been that whenever, from the tenor of the will or from any part of it, sufficient appeared to indicate that the testator had not forgotten his children or grand-children (as the case might be) *when he made his will*, they would not be entitled to a distributive share of his estate, although no legacy was given them by the will. Emphatic language of the Court is, that whatever may have been the grounds of the decision, it came to be well settled that the object of the prior Statute was to furnish a remedy *solely* for those cases where from accident or other causes the child or grand-child might be supposed to have been really forgotten by the testator in making his will.

Reference is then made to the decided cases which affirm that doctrine, and it is undoubtedly true that they sustain the proposition. Construction given to the provision in the prior act was adopted in

the Revised Statutes, which "introduced the broad principle of barring a child of a claim to a distributive share, upon its being made to appear that such omission to give a legacy was intentional and not occasioned by any mistake or accident." Wilson v. Fosket, 6 Met., p. 404, decided in 1844. After born children, it will be remembered, were included in the provision contained in the Colonial Statute, and the twenty-second section of the Revised Statutes expressly provided that when any child of a testator, born after the father's death, shall have no provision made for him by his father in his will or otherwise, he shall take the same share of his father's estate, both real and personal, that he would have been entitled to if his father had died intestate. Rev. Stat. (1836) p. 419. Explicit as this provision is, still it left the question as to what the rule should be in a case where a child was born after the making of the will and before the death of the father, quite undetermined. No such question was presented to the State Court until 1855, when it came up in the case of the will of Thomas P. Bancroft. Bancroft v. Ives, 3 Gray, 367. Agreed statement in the case shows that the testator, having married the plaintiff in that case, had three children by her, and made his will, giving a legacy to each of the children and the residue to his wife. Said children all died in the lifetime of the testator, unmarried and without issue. But two other children were afterwards born to him, who were in full life at the date of the controversy. Plaintiff claimed the whole estate, but the Court held that the provision under which any child for whom its father "shall omit to provide in his will is entitled to a share in his estate, unless such omission was intentional," applies also to children born after the making of the will and before the death of the father. Speaking of that provision as contained in the Revised Statutes, the Court say, we think it manifest that it was not the intention of the commissioners and legislature to alter the law in this respect, but *only* to give effect to the old Statute, and to affirm and give the authority of positive law to the construction which had been put upon it in several cases. Some of the remarks of the Chief Justice who gave the opinion are supposed to be inconsistent with that view of the law, but the opinion itself affords conclusive refutation of that suggestion. Proof of that statement is found in the quotation already given from the opinion, and if more be needed it will be found in the fact that the Court cites with approbation every one of the prior cases which contributed to establish

that construction. Omission to provide for children born after the will and before the death of the father may well be regarded as occasioned by accident or mistake, in a case where the will, made before their birth, gave legacies to all the living children. Hence the Court say in that case, "taking his will and the legacies therein given to the children then living, it appears that it was not his intent to omit any of his children, but to give each a legacy," as therein provided.

True rule therefore is, that a child or the issue of a deceased child, when the testator omits to provide for him in his will, is entitled to a distributive share in the estate, unless it appears that such omission was intentional, and not occasioned by accident or mistake. "Whenever, from the tenor of the will or from any part of it, or from parol proofs, or both combined, sufficient appears to show that the testator had not forgotten his children or grand-children, as the case may be, when he made his will, no such child or grand-child is entitled to a distributive share in his estate, although no legacy was given him by the will." Direct decision is made to that effect in Wilson v. Fosket, 6 Met., p. 403, and there is nothing in the remarks of the Chief Justice in Ives v. Bancroft, 3 Gray, 370, to over-rule or qualify that doctrine. Undoubtedly a testator may revoke, republish, alter or modify his will by any codicil or number of codicils quite up to the time of his death, and in that sense it may be said that a man's will is ambulatory, but it by no means follows, if a man makes a will and dies without revoking, republishing, altering or modifying it, that it must not be construed as of the date when it was made; and if it appears that a child or grand-child having no legacy was intentionally omitted and not by accident or mistake, such child or grand-child is not entitled to a distributive share. It must be so, else it is not true, as is provided in the first section of the Statute of Wills, that every person of full age and of sound mind may devise and dispose of his estate therein described by his last will and testament in writing. Nothing need be said in explanation of the remark that all the testamentary papers in force and capable of taking effect at the decease of the testator, constitute his will, as it is a remark which all must approve, and in that view unquestionably the time to which the question of omission applies is the time of the testator's decease; but it cannot be that the Court in that case intended to hold that evidence of prior acts and declarations of the testator were not admissible as tending to show whether the supposed omission was or was not inten-

tional at the time the will was made. Assuming such to be the effect of that remark, then it is directly contrary to the ruling in Wilson v. Fosket, 6 Met., p. 403, and is expressly over-ruled by the case of Converse et al. v. Wales et al., 4 Allen, 312, which is the latest case upon the subject. Allegation in that case was that the omission was intentional and that it was not occasioned by accident or mistake, and to prove those facts the respondents were allowed to introduce evidence of the declarations of the testator, made before and after the will during a period of twenty years, and they were also allowed to introduce several former wills, in which no provision was made for the petitioners. Instructions of the Court to the jury were also to the same effect, and the petitioners excepted to the ruling of the Court in admitting the evidence, and also to the instructions of the Court.

Opinion was given by Chief Justice Bigelow. He held that in the absence of written evidence there was no mode of proving the intent of the deceased testator, in such a case, more direct and satisfactory than by his acts and declarations on the subject while living, and that the previous wills made by the testator are in the nature of declarations having a direct bearing on the issue. They tend, say the Court, directly to show if the same omission exists in them as is found in the will offered for probate, that it was not occasioned by forgetfulness, mistake, or any accidental circumstances, but was the result of a well settled and deliberately formed purpose. Doubt cannot be entertained, if prior wills are admissible to prove that the omission was intentional, that subsequent codicils are also admissible for the same purpose. Applying those principles to the present case, it is quite obvious that the question under consideration is one of fact, to be determined from the tenor of the will, the attending circumstances, and the parol proofs exhibited in the case. Take the facts as they appear on the face of the will and the codicil, and they are sufficient to show that the complainants were intentionally omitted, and not by mistake or accident. One-third of the net income of the remainder of the estate was given in the will to the father of the complainants during his natural life, and he and the complainants were in full life at the date of the will. By the terms of the will the legacy to the father was limited to his life, but the devise over for the benefit of the poor is plainly and clearly expressed. Parties were all then living, and there is not a doubt entertained by the

Court, as matter of fact, that it was the settled purpose of the testatrix to omit the complainants, and to dispose of the inheritance as specified in the will. Reasonably considered, nothing else can be inferred from the carefully arranged terms in which the legacy to the father and the devise over are expressed. Strong confirmation of this view is found in the terms of the codicil. Codicil was executed on the fourteenth day of July, 1859, after the death of Cornelia W. Thompson, as before explained. Language of the codicil is, I revoke so much of my said will as provides for the said division of the said income, and its payment in three parts. Mention is made of the death of her daughter Cornelia, and she orders and directs that the income of the estate shall be paid under the conditions and provisions contained in the will to her two surviving children by their respective names, during their joint lives, and one-half thereof to the survivor of them, showing, in the language of Chief Justice Bigelow, that it was the result of a well settled and deliberately formed purpose. Irrespective, therefore, of the parol testimony, I am of the opinion that it appears, from the tenor of the will when taken with the codicil, that the omission of the complainants, if such it may be called, was intentional and was not occasioned by accident or mistake, within the meaning of the provision under consideration, in the Mass. Statute of Wills, as expounded by her Courts. Ample provision was made for the father of the complainants, and it makes no difference that the legacy to him was limited to his life, because the fact of that limitation in the will, and its careful repetition in the codicil, especially when taken in connection with the devise over for the benefit of the poor, show conclusively that the entire disposition of the estate was in accordance with the settled purpose of the testatrix. But if there could be any doubt upon this subject, the parol testimony introduced by the principal respondent is conclusive that there is no legal merit in the claim of the complainants. Suffice to say, without reproducing the evidence, that it is fully proved that the testatrix repeatedly said that her son should have his share of the income during his life, but that his children should not have any portion of her estate after his decease. Witnesses say that her declaration was that the son should have the use of one-third of the property during his life, and that after his decease it should go for charitable purposes. Such proofs coincide with the tenor of the will, and with all the presumptions to be drawn from the surrounding circumstances,

and when considered in connection with those circumstances and the unmistakable inferences to be drawn from the tenor of the will, they afford a demonstration that the claim of the complainants has no legal foundation. Strong doubts are entertained whether grand-children living at the date of the will of the grand-father can ever be regarded as omitted because not named as legatees in his will, in any sense within the meaning of the Statute, where it appears that their father was living at the same time, and was provided for in the will. Plainly they cannot be so regarded if the father is the donee of an inheritable estate, because it is expressly enacted, that where such a legacy is given to the father and he dies before the testator, his children shall take the legacy given to him in the will. Gen. Stat., Sec. 28, p. 479. Same conclusion must follow where the legacy to the father is of an estate for life, if the remainder is also devised, unless it be assumed that a devise by a father to his children for life and a remainder over to third persons is void, in case one of the children dies before the father, leaving issue. Grant that proposition, and then it is not true, as enacted in the first section of the Statute, that every person may devise and dispose of his estate by will in writing. Carefully examined, the claim of the complainants is not founded upon any accident or mistake in the testatrix, but it is indubitably an attempt to restrict and qualify the right of parents to dispose of their estate by testamentary devise. Children are omitted when no legacy is given them, and they are in no manner named in the will as exemplified in the decisions of the State Court. Grand-children stand upon the same footing where it appears that their parent died before the execution of the will, because, in that state of the case, they are the issue of a deceased child, and fall directly within the provision upon that subject. Posthumous children fall within the same category, because they are within the express words of the Colonial Statute, and under the decision of the Courts it is also settled that children born after the date of the will and before the death of the testator shall have the same rights. Foundation of the right in all these cases, as expounded by the Courts, is that the omission was unintentional and through accident or mistake, as appears by all the decisions of the State Courts. But in the case at bar there is no such foundation or just pretence for it, and therefore the rule cannot apply. Testatrix, when she made her will, gave legacies to all her children, and when one deceased without issue

she made a codicil, and did the same thing for all who were living, including the father of the complainants. As before stated they were born before the will was made, and neither child nor grand-child was born after the will was executed. All of the circumstances were in the mind of the testatrix both when she made the will and when she afterwards deliberately modified it, and nothing occurred subsequently to give the least countenance to the theory that there was any such mistake or accident as the law contemplates to warrant the interference of the Court.

II. Complainants scarcely deny that the power conferred upon the trustees in the will to select and appoint the committee could be executed by the surviving trustee, provided it be held that the power is one coupled with an interest, but they contend that it is a mere naked power to two persons which cannot be executed by one. Substance of that provision of the will is, that "when upon the decease of all my children the trust fund is to be disposed of as aforesaid," that is, for the benefit of the poor, "the said Marsh and Guild, or their successors as trustees, shall select and appoint three or more gentlemen, who shall be informed of the facts by the trustees, and shall determine how, by the payments to permanently established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect," &c. Three persons were accordingly selected and appointed by the surviving trustee, and they have determined that the several corporations made parties respondents shall be the recipients and beneficiaries of the testatrix's bounty. Record shows that the power has been executed, but it is insisted by the complainants that the proceedings are a nullity. Courts of the United States cannot exercise any equity powers except such as are conferred by an act of Congress, and those judicial powers which the high Court of Chancery in England exercised under its judicial capacity, as a Court of Equity, possessed and exercised at the time of the formation of the Constitution of the United States. Powers not judicial, exercised by the Chancellor as the representative of the sovereign and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the Circuit Courts. Fountain v. Ravenel, 17 How. p. 390. Supreme Court hold that the prerogative power belonging to the sovereign has not been delegated to the federal government, but remains in the several States, and is to be exercised according to the laws and usages prevailing in the several States. Consequently,

whenever, by reason of citizenship or otherwise, a cause is brought before the federal tribunals involving the validity of a bequest or devise to charitable uses, the question to be considered always is whether it would be held valid or not in the Courts of the State. Numerous decisions of the Supreme Court assert this doctrine, and it has been the uniform course of the Court. Phila. B. Ass. v. Hart's Exrs., 4 Whea., 1. Beatty v. Ricker, 2 Pet., 566. Inglis v. Sailors' Snug Harbor, 3 Pet., 99. Wheeler v. Smith, 9 How., 55. State decisions cited for the principal respondent show beyond controversy that the equitable jurisdiction of the Supreme Court of the State is established over charities in its broadest application, that the Statute of Elizabeth is part of the common law of the State, and that it is the settled course of judicial decisions that a devise of property to charitable uses will be upheld. Argument in support of those propositions is unnecessary, as the authorities to support them are numerous, direct and conclusive. Authority to select and appoint the committee was not a personal trust, because it is expressly provided in the will that it shall be exercised by the persons named, or their successors as trustees. Directions of the testatrix in that behalf were not to be carried out until the decease of all her children, and as they or some one of them might live for many years, it was provided that if the persons named as trustees deceased before the time designated for the selection and appointment arrived, the duty might be performed by their successors.

Terms of the will show that the entire estate was vested in the trustees, and their successors as trustees, and they were authorized to sell and convey any and all real estate which might at any time be in their hands, according to their *joint and sole* discretion. Looking at the terms of the will, no doubt is entertained that the power in question is one coupled with an interest. Such a power survives, and may be exercised by a surviving trustee, or by successors. Butler v. Bray, Dyer, 189. Atty. Gen. v. Glegg, 1 Atk., 356. Lewin on Trusts, p. 434. Suppose, however, that any doubt could arise upon the subject under the general equity law, still the decisions of the State Courts fully support the proposition, and they must be regarded as conclusive. Green v. Borland, 4 Met., 330. Dixon v. Homer, 12 Cush., 43. Dexter v. Gordon, 7 Allen, 243.

III. Sufficient has already been remarked to show that the third proposition of the complainants cannot be sustained, because it is

made to appear that the intention of the testatrix to give the property for the benefit of the poor has been legally carried into effect. Other propositions were submitted by the complainants, but they are so fully answered by the State decisions that it seems quite unnecessary to enter into argument upon the subject. Unless the State decisions are to be over-ruled, it is plain that the second and third propositions of the complainants cannot be sustained. In view of the whole case, I am of the opinion that the complainants are not entitled to relief. Bill of complaint dismissed with costs.

Supreme Court of the United States.

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ABBY R. LORING *et all.* v. L. H. MARSH *et als.*

IN EQUITY.

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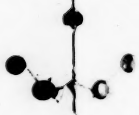

BILL.

The Complainants are the children of Josiah Q. Loring, who sue by their next friend against Levi H. Marsh as executor and trustee of Abigail Loring, and various charitable institutions made parties by amendment on pages 11 and 12.

The bill alleges that testatrix made a will and codicil which have been duly proved and allowed, and thereby devised the residue of her estate to the said Marsh and one Guild, since deceased, and their survivor in trust, to pay one third of income to each of her children, Abby, Cornelia, and Josiah Q., during their lives, and on the death of either to accumulate its share until the last one should decease, then with the principal to be disposed of for the benefit of the poor as thereafter provided—to wit: that then the said trustees, or their successors, should select three persons who should designate what incorporated charitable institutions would be the best recipients of the fund for the benefit of the poor, and the proportions in which it should be paid to them; that said Cornelia deceased without issue, and said Josiah Q. afterwards leaving issue before their mother and said Abby deceased after her without issue.

Bill alleges (page 3) that the devise to charitable uses is void and cannot be executed.

That complainants and the administrator of said Abby are the sole heirs and entitled to the whole estate of the testatrix, and that Marsh is bound to account with them, which he refuses to do.

Concludes with interrogatories as to the facts alleged, and prays for an account and payment.

Annexed is a copy of the will (pages 3, 4, 5, 6), the purport of which has been before stated; also a copy of the codicil made after the decease of her daughter Cornelia, directing that the income be divided into halves instead of thirds.

Answer of L. H. Marsh (page 7) admits facts generally as alleged; denies that the disposition of estate is illegal; alleges (page 8) that in pursuance of direction he selected three persons and requested them to determine how, by payment to incorporated charitable institutions, the wish of the testatrix to benefit the poor would best be effected, who considered the matter and certified their opinion to him in writing, a copy of which is produced; that he approved of it, and said institutions assented, and he was about to pay over when stopped by this suit.

Before this bill was filed, this defendant had filed a bill of interpleader in the Supreme Court of Massachusetts against the complainants and said institutions, which is still pending; and he claims the benefit of this defence as if pleaded.

The defendant also suggests that this Court has no jurisdiction over this cause, that the complainants' remedy is at law, not in equity, and that Peter Renton, as administrator, is not properly a party defendant, and ought to be joined as plaintiff, if entitled to appear at all.

Then follows (page 9) the award of the committee appointed to designate the institutions to which the fund should be paid.

Page 13 contains the answer of these institutions, claiming such interest as they are entitled to.

Then follows a general replication.

Then an amendment to the bill setting forth that the complainants are the issue of said Josiah a son of the testatrix, and that she omitted to provide for them in her will, and did not in her life

same share of the estate as if she had died intestate.

An amendment to the answer denies the proposition of law, and alleges that the testatrix did provide for Josiah Q. in his life time, and that the omission to provide for his issue was intentional.

Then follow various motions, now of no importance, and the decree of the Court (page 16), dismissing the bill with costs.

The depositions of S. B. Thompsom (page 17), L. H. Marsh (page 19), Peter Renton (page 20), contain nothing material.

Deposition of M. R. Burton (page 23), answer to 4th int.—The testatrix often spoke of her son Josiah Q. and his children. Answer to 5th int.—About four weeks before she died she said that they had got enough, and that Dr. Renton had all he would ever get.

Deposition of Eliza A. Pratt (page 24), answer to 3d int.—Lived with the testatrix as companion for seven years.

4th.—I lived with her in October, 1858, and witnessed her will then made.

5th.—Also her codicil in July, 1859.

9th.—Her son Josiah had married a daughter of Dr. Renton before I lived there. He left children who survived his mother.

10th.—When the will was made he was often at the house, but there was no communication between the family and his wife and children.

15th to 21st, inclusive, contain statements of testatrix to the effect that her son's children should not derive any benefit from her estate, and that this intention was repeatedly expressed, that he should have the benefit of it during his life, and then it should go to institutions, so that his children should not get it, and that she was well aware of their existence.

The cross examination on pages 28, 29 and 30, does not alter the facts previously stated, or elicit any new material ones.

On pages 34 and 39 are the bill and answers in the suit of interpleader, so called, in the Supreme Court of Massachusetts.

At the time of the award the fund was about $171,000.

F. C. LORING, *Solicitor for Charitable Institutions.*
C. W. LORING, *Solicitor for L. H. Marsh.*
S. BARTLETT, *of Counsel for Defts.*

U. S. Supreme Circuit Court.

ABBY R. LORING & ALL.

vs.

L. H. MARSH, TRUSTEE, & ALS.

BRIEF FOR CHARITABLE INSTITUTIONS, DEFTS.

FIRST POINT.

In administering the law in relation to charities, the United States Courts are governed by the local law of the State, in the same manner as in relation to real estate.

The prerogative power belonging to the Sovereign has not been delegated to the Federal Government, but remains in the several States, and is exercised according to the usages or laws prevailing in each, and of course varying in every State ; and whenever, by reason of citizenship or otherwise, a cause is brought before the United States Courts touching the validity of a gift to charitable uses, the question to be considered is whether it would be held valid or not by the Courts of the State. Such has been the uniform doctrine of the U. S. Courts from the beginning to the present day.

This is so conclusively settled by authority that it is not open to argument.

Phila. Bap. Assoc. vs. Harts Ex'ors, 4 Wheaton, 1.

This suit was brought in Virginia, and it was held that a gift to an unincorporated voluntary association was void, because the Statute of Elizabeth was not in force in that State.

Beatly vs. Ritchie, 2 Peters, 566.

A similar devise was held good because valid by the laws of Maryland.

Inglis vs. Trs. Sailors' Snug Harbor, 3 Peters, 99.

Devise to a charitable use held good because so by laws of New York.

Johnson J., p. 137, speaks of the case in 4 Wheaton as decided exclusively upon the laws of Virginia. Page 142 he says—"But as a charity to be governed by the laws of the State of New York, it appears to me almost idle to view this case with reference to any other rule of decision than their own adjudications."

Vidal vs. Girard's, Ex'ors, 2 Howard, 127.

The validity of the devise in this case was considered solely in reference to the Common Law in force in, and the Statutes of the State of Pennsylvania.

Wheeler vs. Smith, 9 Howard, 55.

Devise to a charitable use held invalid because so by the laws of Virginia.
See opinion, pages 77, 78, as to charities being governed by local laws of each State.

Fountain v. Ravenel, 17 Howard, 369, page 384.

"The appellants endeavor to sustain this charity under the laws of Pennsylvania. This is according to the course of the Court."

"The Courts of the United States cannot exercise any equity powers except those conferred by Congress, and those judicial powers which the high Court of Chancery in England, acting under its judicial capacity as a Court of Equity, possessed and exercised at the time of the formation of the Constitution of the United States."

"Powers not judicial exercised by the Chancellor as the representative of the Sovereign, and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the Circuit Courts."

Chief Justice Taney held (page 391) that if the bequest was valid as a charity it could not be enforced by a United States Court for want of jurisdiction. Page 392—"The Chancery Jurisdiction of the Courts of the United States as granted by the Constitution extends only to cases over which the Court of Chancery has jurisdiction in its judicial character as a Court of Equity. The wide

discretionary power which the Chancellor of England exercises over infants, lunatics or idiots, or charities, has not been conferred." These prerogative powers, which belong to the Sovereign as *parens patriæ*, remain with the States.

"In a suit by an heir, a representative of the testator, to recover property or money bequeathed to a charity, the Court must of necessity examine whether the bequest was valid or not by the laws of the State."

There is no conflict of authorities on this point; they are unanimous. The question is then presented whether or not this bequest is valid by the laws of the State of Massachusetts. If it would be maintained by the Courts of that State, it must be here.

SECOND POINT.

The bequest is good according to the laws of this State, both according to its Common Law and its Statutes.

The control of the Legislature as *parens patriæ* over the administration of charities has been constantly exercised from the earliest date to the present, and jurisdiction over them vested in its Courts.

Ancient Charters, page 52, will be found an Act passed in 1641, respecting Benevolent or Charitable donations, by which it was ordered that all gifts and legacies to the Colleges, Schools of learning or other public use shall be faithfully disposed of according to the intent of the donors, and the persons entrusted therewith are required to account to the County Courts.

See also Statute 1785, ch. 51.
Revised Statutes, ch. 30, s. 39, &c.
Statute 1847, ch. 213.
Statute 1849, ch. 186, s. 8.
Statute 1855, ch. 302.

By the General Statutes, ch. 14, s. 20, it is made the duty of the Attorney General to "enforce the due application of funds given or appropriated to public charities."

By chapter 113, sections 1 and 2, the Supreme Court is vested with the whole jurisdiction of the English Court of Chancery.

If the Executor of this will had refused or neglected to perform the trust reposed in him, it would have been the duty of the Attorney General to have filed an information against him to enforce due application of the funds devoted to public charities by the testatrix, and it is certain that the Courts of this State would have entertained the suit.

Hadley vs. Hopkins Academy, 14 Pick. 240.
See pages 253, 262.
Going vs. Emery, 16 Pick. 114.
Burbank vs. Whitney, 24 Pick. 146.
Bartlett vs. Nye, 4 Metcalf, 378.
Washburn vs. Sewall, 9 Metcalf, 280.
Sohier vs. St. Paul's Church, 12 Metcalf, 250.
Brown vs. Kelsey, 2 Cushing, 243.
Winslow vs. Cummings, 3 Cushing, 358.
Bliss vs. Am. Bible Society, 2 Allen, 234.
Sanderson vs. White, 18 Pick. 328.

These cases establish the equitable jurisdiction of the Supreme Court over charities in its fullest extent—that the Statute of Elizabeth is a part of the Common Law of this State, and that it is the settled law of this State that an appropriation of property to charitable uses will be upheld—that it is no objection that no person is named capable of taking the legal interest—that the Court will supply the place of a trustee, and will sustain and protect such a gift whenever it is consistent with public policy and local laws and the intention of the donor can be accomplished ; and if it cannot be literally carried into effect, will accomplish it as near as possible.

THIRD POINT.

The intent of the testatrix is explicit and legal, and can be accomplished, and has been carried into effect in the mode designated by her.

The object of the testatrix was to benefit the poor, an intent not inconsistent with public policy or local laws.

The mode in which that intent was to be effected was by distributing the trust fund among established, incorporated, charitable institutions. It would be difficult to devise a better mode for the appropriation of a large sum to charitable uses.

These institutions were not mentioned by name — the duty or trust was imposed on the trustees of selecting a committee to make the distribution.

The testatrix had been an invalid, confined to her chamber for a long time. The bequest was not to take effect until the decease of her last surviving child. She was sensible that a committee then to be appointed would be much more competent to judge how her intent would be best accomplished than she could. The mode she adopted was simple, not inconsistent with local laws or public policy, —in fact, very judicious.

The trust has been performed, the committee have been selected; they have performed the duty, and designated various institutions, having the qualifications required by the testatrix, to receive various sums of money, and the trustee is ready to pay them.

There is no vagueness, indefiniteness or uncertainty as to the objects of her bounty. They are fixed with as much certainty as if she had bequeathed to them by name the sums of money directed to be paid to them.

If she had done this no question could be made as to the validity and legality of the bequests. The only objection can be that the will does not designate the objects of her bounty.

To this it may be answered: *first*, that being a gift to charitable uses the Courts of Massachusetts will carry out the intent and effect of the will; *second*, that the law considers as certain and definite that which can be made so, and that the will expressly provides for ascertaining with precision the objects of the bounty; *third*, that the Courts of Massachusetts have frequently sustained gifts to charitable uses where the objects of the bounty were as uncertain as here.

Hadley vs. Hopkins Academy, 14 Pick. 240.

A devise to trustees for the purpose of giving some encouragement for the breeding up of youth in a way of learning, both at the grammar schools and college, for the public service of the country in future times, was held good.

Going vs. Emery, 16 Pick. 107.

Devise of residue for the benefit of true piety and religion.

The executor was directed to sell and convert, and pay proceeds to four named individuals, to be by them appropriated to the cause of religion, and distributed in such divisions and to such societies and religious, charitable purposes as they shall see fit. It was contended that the devise was void for uncertainty, but the Court held otherwise.

The present case is similar to that, except that the persons to make the distribution are named by the testatrix instead of her trustees.

Brown vs. Kelsey, 2 Cushing, 244.

Bequest of money, the income to be appropriated for the support of evangelical preaching by such ministers as shall be approved by a majority of the members of the Middlesex Union Association.

Devise of residue for the promotion of such religious and charitable enterprises as shall be designated by a majority of the pastors composing said Association.

Both held good as against the heirs at Law.

The Statute of Elizabeth being a part of the common law of this State, and the laws regulating charitable uses being the same with those of England, the decisions of the English Courts are authorities here.

These are so numerous that it would be difficult as well as idle to cite them all; they are collected in Story's Equity, Vol. 2, Chap. 32, and in Moggridge vs. Thackwell, 7 Vesey, 36. A few will serve for illustration.

Att'y Gen. vs. Hickman, 2 Eq. Ca. Ab. 193.

A devise was made to A., to be disposed of in charity as he, assisted by B. H., should see fit. They all deceased before the testator. Held that the devise was valid, and the Court would carry the testator's intent into effect.

Att'y Gen. vs. Syderfin, 1 Vern. 224, 7 Vesey, 45.

Bequest of £1000 to charitable uses as testator had directed. No direction could be found. Held that the bequest was not void for uncertainty, and should be executed.

Baker vs. Sutton, 1 Keene, 224.

Bequest of residue to four persons in trust that they and their survivors and the executors and administrators of such survivors should dispose of the same for such religious and charitable institutions and purposes as a majority should see fit. Sustained as a good charitable bequest.

Horde vs. Earl of Suffolk, 2 My. & Keene, 59.

Bequest of sums to trustees to be distributed anually in charities, at the discretion of the trustees, to private individuals or public institutions. Sustained.

Moggridge vs. Thackwell, 7 Vesey, 68.

Devise of residue to A., desiring him to dispose of the same in such charities as he shall think fit. A. deceased before the testatrix. Held that nevertheless the devise was valid, and the Court would carry it into effect.

There is a class of cases in which bequests to persons to be disposed of at their discretion for purposes not limited to pious or charitable uses, and where it is obvious that the legatees were not intended to take beneficially, have been held void for uncertainty.

But all these cases rest upon the ground that the legacies were not for charitable uses within the Statute of Elizabeth, or not limited to such, and might be appropriated to other purposes.

In the present case it is otherwise; the sole and exclusive intent of the testatrix was to benefit the poor at large, a charitable purpose clearly within the Statute, and the intent was to be effected by a selection of incorporated institutions the best qualified to effect such intent.

One of the cases mentioned in the Statutes is that of devises for the relief of poor people.

In Sanderson vs. White, before cited, it was held that in this State a gift to charitable uses would never be held void for uncertainty.

The bequest must, therefore, be held valid.

Cresson v Cresson 6 Law Reg 42. Townsend v Barns 3 Hare 257
Whicker v Hume 6 E C Eq 217. Nightingale v Goulburn 2 Phillips 594
Losamb v Whittingham 12 Beavan 87. London Un. v Yarno 6 Law Reg. 19

FOURTH POINT.

The trust or authority vested in the named trustees, Marsh and Guild, to select and appoint a committee to determine what charitable institutions should receive the fund, was well executed by the survivor.

The trust or authority was not *personal*, it was to be exercised by those named *or their successors*; it could not be executed till the last of the children of the testatrix should decease—an uncertain and probably remote period, before which it was possible if not probable that the trustees named might decease. It was therefore provided that it should be exercised by their successors.

It is well settled that a power given to trustees survives, and has been so for many years.

Butler vs. Bray, Dyer, 189.

A conveyance was made to four trustees to the intent that the son of the bargainer should be married at the appointment and nomination of the trustees and their assigns. One of the trustees died, and it was argued that the authority was gone. The Court decided otherwise.

Attorney Gen. vs. Gleg, 1 Atkyns, 356.

A person named three executors, and gave sums of money to be distributed to charities at their discretion. One of them deceased. Held that the survivors could execute the power.

See Moggridge vs. Thackwell.
Attorney Gen. vs. Hickman, before cited.

Mr. Lewin states the law to be that if an authority over the trust fund be committed to trustees, the presumption is that as the power is coupled with an interest, it was meant to survive.

Lewin on Trusts, 434.

In this case the trustees had an interest ; the whole legal estate was vested in them, subject to the trust.

As the question arises under a will made and established in this State, creating the trust now under consideration, the Statutes of this State and decisions of its Courts must furnish the law for this Court, in relation to the appointment of trustees and the administration of the trust.

In Greene vs. Borland, 4 Metcalf, 330, it was decided by the Supreme Court of this State that a sole trustee, appointed in the place of two, could lawfully execute the trust and maintain an action for the recovery of the trust estates.

In Dixon vs. Homer, 12 Cushing, 43, it was also held that surviving trustees could execute a trust, though it might be the duty of the Court of Probate to fill vacancies; and that until this was done, a sole surviving trustee could lawfully act.

According to the established law of this State, as well as the English practice, Mr. Marsh, as surviving trustee, could lawfully execute the trust, and the complainants, and all the persons interested in the estate, have consented that he should do so.

As two trustees were originally named, any person interested in the estate had a right to have the vacancy filled, and could readily have procured this to be done by application to the Probate Court if the surviving trustee had refused to consent to the appointment of a co-trustee.

See case last cited.

Mr. Guild, the co-executor and co-trustee, deceased before the testatrix. Mr. Marsh, the survivor, assumed and has executed both trusts. The heirs at law have made no objection, but have by silence assented thereto, and cannot make the objection here.

If, however, it could be held that there has been irregularity or informality in the appointment of a trustee or the execution of the trust, that alone cannot affect the validity of the devise, or give the heirs at law any interest in it.

If the devise was originally good, the property is wholly given away from the heirs.

Sanderson vs. White, 18 Pickering, 328.

"No neglect, misapplication of funds, or other breach of trust, will give a right to the heirs at law to call upon a Court of Equity to declare a resulting trust for themselves; and, of course, they have no pecuniary or beneficial interest accruing from the non-execution of such a trust."

Boyle on Charities 48. 170
Shelf. on Mortmain 600

FIFTH POINT.

The Supreme Court of Massachusetts has power to administer this charity, whether that power is executive or judicial.

If judicial, there can be no question about it; if executive, and, such as in England would be exercised by the Sovereign as *parens patriæ*, in or through his Court of Chancery as a prerogative power, then the Constitution and Laws of Massachusetts have conferred that power upon its Supreme Court, and such power has been exercised by its judicial tribunals from the foundation of the colony to the present day.

This prerogative power does not belong to the United States; it was one of the powers reserved to the several States in their sovereign capacities. Of course it was competent for the people of each State, in establishing its Constitution and Laws, to direct in what manner and by what tribunal it should be exercised.

Fountain vs. Ravenel, 17 Howard, 384.

"Powers not judicial, exercised by the Chancellor merely as the representative of the Sovereign and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the Circuit Courts."

Page 393.

"These prerogative powers, which belong to the Sovereign as *parens patriæ*, remain with the States. They may legalize charitable bequests within their own respective dominions, to the extent to which the law has been carried in England; and they may require any tribunal of the State which they may think proper to select for that purpose, to establish such charities and to carry them into execution."

By the Constitution of Massachusetts, its General Court is authorized, without limitation or qualification, to establish all manner of judicial tribunals, &c.

By its laws it has clothed its Supreme Court with all the authority exercised by the Chancellor of England, whether judicial or executive, so far as it is exercised by him in the Court of Chancery.

The distinction here between *judicial and executive* is not well defined, and seems to be technical.

It seems to be agreed, however, that the jurisdiction over charities, guardians, idiots, &c., is technically executive and not judicial; but this distinction has reference to the source of the power rather than its nature.

The power exercised by Courts of Chancery, Probate Courts and other Tribunals over charities, infants, idiots, wills, administration, and so forth, is in its nature and in common acceptation judicial, and is always entrusted to judges. Because in England it is a prerogative power, belonging to the king, does not alter its nature.

If it should be held that the Legislature of Massachusetts could not vest this power in its Supreme Court, because it is an executive power, then all legislation creating Probate Courts, and relating to infants, idiots, &c. &c. is void, because the jurisdiction over such objects is equally executive and cannot be exercised by a Court.

The Statutes cited on page 3, and the uniform decisions of the Courts of this State, affirm the contrary, and that the Supreme Court of this State has and lawfully exercises all the jurisdiction over charities which the Chancellor of England exercises, whether in his judicial or executive capacity.

Strictly speaking, the prerogative power of the king as *parens patriæ*, is not vested in the Courts, but remains in the Sovereign, the people or State, which directs here by which of its officers and tribunals it shall be administered, and being in its nature judicial, it is properly entrusted to its Courts of Justice.

SIXTH POINT.

The case does not fall within the letter or spirit of the 25th section of chapter 92 General Statutes of Massachusetts, in not providing for the issue of a deceased child.

1. When the will was made, no *such* issue were living, and none were born afterwards. As to the grand-children the will was valid, and nothing has occurred since to change it except the death of a child for whom provision was made—and to which provision his issue would be entitled if it had continued beyond his life.

2. It appears that the omission to provide for such issue was intentional.

No stronger proof of such intention could be imagined than the will itself in making provision for the parent during his life only, it appearing that the testatrix at the time well knew and never forgot the existence of his children.

3. Parol evidence of the declarations of the testatrix is admissible to prove that the omission was intentional.

Wilson vs. Foskett, 6 Metcalf, 400.
Bancroft vs. Ives, 3 Gay, 370.

The question before the Court being the construction and effect of a State Statute, the decisions of its highest Courts are obligatory upon the Courts of the United States.

Sumner vs. Hicks, 2 Black. 532.

The testimony of Eliza Pratt on this subject is uncontradicted and conclusive.

SEVENTH POINT.

The answer alleges the pendency of a prior suit between the same parties, upon the same subject matter, in another Court of Equity, in the same State and District.

This is a good defence of itself.

Mallett vs. Dexter, 1 Curtis, 178.

In such case comity requires that the second suit should be continued until the first is decided.

Presbyterian Church vs. McMaster, 6 Law Register, 526.

EIGHTH POINT.

The complainants remedy is in a Court of Probate or Law, and not in Equity.

The bill alleges that the trust created by the will is ended, and that the Comp'ts are entitled to the trust estates. It asks for no relief or discovery which they could not have at Law, or in a Court of Probate.

Wilson vs. Leishman, 12 Metc. 316.
Walker vs. Cheever, 20 Law Reporter, 285.
Mallett v Dexter 1 Cush 178

NINTH POINT.

If the devise to charity is void, as complainants allege, then they are entitled to one half the fund, and Peter Renton, the defendant, as the administrator of the daughter who survived the testatrix, is entitled to the other half. They have the same interest in the fund, and should have been joined as Plffs.

The bill states no reason why they could not be.

F. C. LORING,
Solicitor for the Charitable Institutions, Defendants.

Supreme

U. S. Circuit Court.

ABBY R. LORING

vs.

LEVI H. MARSH.

BRIEF OF F. C. LORING,

For Defendant Corporations.

U. S. Supreme Court.

No. 51.

ABBY R. LORING *et all.*

v.

LEVI H. MARSH *et als.*

Defendants' Abstract and Brief for Charitable Institutions.